CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted]222

A. P. KENNEDY AND JOHN KENNEDY

vs.

THE UNITED STATES OF AMERICA.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED FEBRUARY 17, 1923.

(29,409)

(29,409)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 859.

A. P. KENNEDY AND JOHN KENNEDY

vs.

THE UNITED STATES OF AMERICA.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 5, 1923.

1 United States Circuit Court of Appeals, Eighth Circuit.

No. 5854.

A. P. KENNEDY and JOHN KENNEDY, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

The United States Circuit Court of Appeals for the Eighth Circuit, certifies that in the case above entitled which is pending in this court, the record on the writ of error to the trial court, the United States District Court for the Western District of Oklahoma, discloses these facts:

The plaintiffs in error, defendants below, were indicted, tried, convicted and each of them was sentenced to confinement in jail for six months and to pay a fine of $1,000 for having eighteen quarts of whiskey in his possession in the Indian Country, in the County of Osage, in the State of Oklahoma, on the 24th day of July, 1920, in violation of the Act of July 23, 1892, Section 4136*a*, Compiled Statutes, and its amendments, (United States vs. Wright, 229 U. S. 226, Joplin Mercantile Co. vs. United States, 236 U. S. 531), the Act of January 30, 1897, Section 4137, Compiled Statutes, and the Act of May 25, 1918, Section 4137*a* Compiled Statutes, which made
2 possession of intoxicating liquor in the Indian Country a criminal offense and prescribed a punishment of not exceeding two years' imprisonment and a fine of not exceeding $300 for the first offense.

Each of the defendants demurred to the count of the indictment which charged this offense on the ground that the parts of the Acts cited above which created the crime of and fixed the punishment for having possession of intoxicating liquor in the Indian Country were superseded and repealed before the 24th day of July 1920 by the enactment of the National Prohibition Act of October 28, 1919, 41 Statutes at Large 305, so that the count of the indictment challenged was insufficient in law and charged no offense. The District Court overruled the demurrer, that ruling is assigned in this court as error by the defendants below, and they cite in support of that assignment Title II, Sections 3, 25, 29, 33, and 35 of the National Prohibition Act.

It is further certified that the following question of law arises from the record in this case and is presented to this court for decision, that the decision of it is indispensable to a determination of this case, and that this court desires and requests the instruction of the Supreme Court upon it to the end that it may properly discharge its duty.

Was that portion of the Act of July 23, 1892, Section 4136*a*, Comp. Stat. as amended by the Act of January 30, 1897, Section 4137 Comp. Stat. and by the Act of May 25, 1918, Section 4137*a*, Comp. Stat., which made possession of intoxicating liquor in the

Indian Country a criminal offense and fixed the punishment
3 therefor repealed, superseded or modified by the enactment of the National Prohibition Act, 41 Statutes at Large, 305, 308, Title II, Sections 3, 25, 29, 33 and 35? Walter H. Sanborn, United States Circuit Judge; Wm. F. Kenyon, United States Circuit Judge; John C. Pollock, United States District Judge, who are the judges who sat in the Circuit Court of Appeals on the hearing of the case.

[File endorsement omitted.]

4 United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing Certificate in the case of A. P. Kennedy, et al., Plaintiffs in Error, vs. United States of America, Defendant in Error, No. 5854, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said Certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixth day of February, A. D. 1923. E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. [Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

[Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1922. No. 5854. A. P. Kennedy, et al., Plaintiffs in Error, vs. United States of America. Certificate of Question to the Supreme Court of the United States.

Endorsed on cover: File No. 29,409. U. S. Circuit Court Appeals, 8th Circuit. Term No. 859. A. P. Kennedy and John Kennedy vs. The United States of America. (Certificate.) Filed February 17th, 1923. File No. 29,409.

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No. 222

In the

Supreme Court of the United States.

October Term, 1923.

A. P. KENNEDY AND JOHN KENNEDY,
Plaintiffs in Error,

VERSUS

THE UNITED STATES OF AMERICA,
Defendant in Error.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF PLAINTIFFS IN ERROR

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 222.

A. P. KENNEDY AND JOHN KENNEDY,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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(I) The question certified by the Circuit Court of Appeals for the Eighth Circuit to this court must be answered in the affirmative, inas-

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 222.

A. P. KENNEDY AND JOHN KENNEDY,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *of* PLAINTIFFS *in* ERROR.

Statement.

This case is here on certificate from the Circuit Court of Appeals for the Eighth Circuit. A single question of law is involved, and that is, whether or not that portion of the Act of July 23, 1892, as amended by the Act of January 30, 1897, and by the Act of May 25, 1918, which made the possession of intoxicating liquor in the Indian Country a criminal offense, and fixed the punishment therefor, was repealed, superseded or modified by the enactment of the National Prohibition Act.

No further statement is necessary than to place before the court the certificate by the Circuit Court of Appeals, and the various Acts of Congress involved, so far as pertinent to the underlying question of law to be determined.

Omitting caption, certificate of the clerk of the Circuit Court of Appeals, and endorsements, the certificate is as follows:

> The United States Circuit Court of Appeals for the Eighth Circuit, certifies that in the case above entitled which is pending in this court, the record on writ of error to the trial court, the United States District Court for the Western District of Oklahoma, discloses these facts:
>
> The plaintiffs in error, defendants below, were indicted, tried, convicted and each of them was sentenced to confinement in jail for six months and to pay a fine of $1,000 for having eighteen quarts of whiskey in his possession in the Indian Country, in the County of Osage, in the State of Oklahoma, on the 24th day of July, 1920, in violation of the Act of July 23, 1892, section 4136a, Compiled Statutes, and its amendments (*United States* v. *Wright*, 229 U. S. 226; *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531), the Act of January 30, 1897, section 4137, Compiled Statutes, and the Act of May 25, 1918, section 4137a, Compiled Statutes, which made possession of intoxicating liquor in the Indian Country a criminal offense and prescribed a punishment of not exceeding two years' imprisonment and a fine of not exceeding $300 for the first offense.

Each of the defendants demurred to the count of the indictment which charged this offense on the ground that the parts of the acts cited above created the crime of and fixed the punishment for having possession of intoxicating liquor in the Indian Country were superseded and repealed before the 24th day of July, 1920, by the enactment of the National Prohibition Act of October 28, 1919, 41 Statutes at Large 305, so that the count of the indictment challenged was insufficient in law and charged no offense. The District Court overruled the demurrer; that ruling is assigned in this court as error by the defendants below, and they cite in support of that assignment Title II, sections 3, 25, 29, 33 and 35 of the National Prohibition Act.

It is further certified that the following question of law arises from the record in this case and is presented to this court for decision, and that the decision of it is indispensable to a determination of this case, and that this court desires and requests the instruction of the Supreme Court upon it to the end that it may properly discharge its duty:

Was that portion of the Act of July 23, 1892, section 4136a, Comp. Stat., as amended by the Act of January 30, 1897, section 4137, Comp. Stat., and by the Act of May 25, 1918, section 4137a, Comp. Stat., which made possession of intoxicating liquor in the Indian Country a criminal offense and fixed the punishment therefor repealed, superseded or modified by the enactment of the National Prohibition Act, 41 Statutes at Large, 305, 308, Title II, sections 3, 25, 29, 33 and 35?

Statutory Provisions of Acts of 1892, 1897 and 1918.

The Act of July 23, 1892, section 4136a, section 2139, Revised Statutes, 27 Statutes at Large 260, Compiled Statutes, 1916, is as follows:

> No ardent spirits, ale, beer, wine or intoxicating liquor or liquors of whatever kind shall be introduced under any pretense, into the Indian Country. Every person who sells, exchanges, gives, barters or disposes of any ardent spirits, ale, beer, wine or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer or intoxicating liquor of any kind into the Indian Country *shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offense.* But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine or intoxicating liquors into the Indian Country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department.

The Act of January 30, 1897, 29 Statutes at Large 506, section 4137, Compiled Statutes, 1916, is as follows:

> That any person who shall sell, give away, dispose of, exchange, or barter any malt, spiritous or vinous liquor including beer, ale and wine, or any ardent or other spiritous liquor of any kind whatsoever, or any essence, extract,

bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian, a ward of the Government, under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spiritous, or vinous liquor, including beer, ale and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian Country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, *shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter;* provided, however, that the person convicted shall be committed until the fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine or intoxicating liquors into Indian Country that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department.

The acts just quoted relate to the selling of intoxicating liquors to Indians, and the introduction thereof into the Indian Country. Thereafter, on May

25th, 1918, Congress passed an act enlarging the operation of the two former acts so as to make it an offense for any person to have intoxicating liquors in his possession in the Indian Country. This act, section 4137a, Compiled Statutes, 1916, is as follows:

> On and after September first, nineteen hundred and eighteen, *possession by a person of intoxicating liquors in the Indian Country*, where the introduction is or was prohibited by treaty of the Federal Statutes *shall be an offense and punished in accordance with the provisions* of the acts of July twenty-third, eighteen hundred and ninety-two (Twenty-seven Statutes at large, page two hundred and sixty), and January thirtieth, eighteen hundred and ninety-seven (Twenty-ninth Statutes at large, page five hundred and six).

That the act of 1897, set out above, is merely an amendment to the act of 1892, although not so entitled, is now well established by *United States* v. *Wright*, 229 U. S. 226, 57 L. ed. 160, and *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, the effect of which decisions is that, in the passage of the act of 1897, Congress did not intend to repeal the act of 1892, but kept it alive and carried with it the penalties it imposed. After passage, therefore, of the act of 1918, up to the time of the taking effect of the National Prohibition Law, it was unquestionably a violation of the Federal Statute to have *possession of intoxicating liquors in the Indian Country*,

and the penalty for the violation thereof, as prescribed by the act of 1892, was imprisonment of not more than two years and a fine not to exceed three hundred dollars.

Statutory Provisions of National Prohibition Act.

Section 3, Title II, of the National Prohibition Law, which is a law passed to vitalize the Eighteenth Amendment, 41 Statutes at Large 308, among other things, provides as follows:

> No person shall on and after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, deliver, furnish or *possess* any intoxicating liquor except as authorized in this act, and all provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

The rest of the preceding section, excepting wine used for sacramental purposes, and so forth, is immaterial.

Section 25, Title II, 41 Statutes at Large 315, also provides:

> *It shall be unlawful to have or possess any liquor* or property designed for the manufacture of liquor intended for use in violating this title, or which has been so used, and no property rights shall exist in any such liquor or property.

Section 33, Title II, of the act, prescribes, after February 1, 1920, the possession of liquor by any person shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away or otherwise disposed of in violation of the provisions of the act.

Section 35, Title II, of the act, 41 Statutes at Large 317, also provides as follows:

> All provisions of the law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The penalties imposed by the National Prohibition Act for the offense of having, or being in pos-

session of, intoxicating liquor unlawfully, will be found in Section 29, Title II, 41 Statutes at Large 316, which is as follows:

> Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.
>
> Any one violating the provisions of any permit, or who makes any false record, report or affidavit required by this title, *or violates any of the provisions of this title, for which offense a special penalty is not prescribed,* shall be fined *for the first offense not more than $500;* for a second offense *not less than $100, nor more than $1,000 or imprisoned not more than ninety days;* for any subsequent offense he shall be fined *not less than $500, and be imprisoned not less than three months nor more than two years.* It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information or indictment. The penalties provided in this act against the manufacture of liquor without a permit shall not apply to a person for manufacturing non-intoxicating cider or fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.

Inasmuch as no penalty is specifically provided in other parts of the act for the offense of unlawful possession of intoxicating liquor, it necessarily follows that the punishment for such offense, under the National Prohibition Law, is *a fine of not more than $500 for the first offense*, and for the second offense, *a fine of not less than $100, nor more than $1,000, or imprisonment not more than ninety days.* This being the first offense, since neither the certificate nor the record below show any pleading in the indictment of a former conviction, if the defendants below had been tried under the National Prohibition Act, their punishment could not have been anything but a fine, not to exceed $500. It follows, therefore, that the penalty under the old law was far more severe than what could have been imposed under the National Prohibition Law.

From what has been shown as to the state of the law, there would ordinarily be no controversy as to the proposition that the National Prohibition Act repealed the former Federal Acts affecting the sale or possession of intoxicating liquor in the Indian Country, were it not for the peculiar language found, in what is termed the repealing clause, section 35, title II, of the Volstead Act. That section, however, when carefully analyzed, seems merely to undertake by express language, what would have been the effect, if no repealing clause had been inserted at all, and the question as to whether or not there had been a repeal had been left to be determined by

the rules underlying repeals by implication. The act seems to recognize that inconsistent provisions of the later act necesssarily repeal like provisions in the former act, and undertakes to save, what it really had no need to preserve, such of the former act as were not inconsistent with the later and final Act of Congress. The language of the section is that "all provisions of law that *are inconsistent* with this act are repealed *only to the extent of such inconsistency.*" The act, therefore, does not undertake to save from repeal any provisions of any other act that may be inconsistent with its own.

Upon the effect of this repealing clause, the District Courts and Circuit Courts of Appeals have been in wide variance. When we carefully examine and analyze the former and present legislation by Congress, however, and apply to them the decisions of this court, all the doubt disappears, and the conclusion is inevitable that former Acts of Congress, in the respects involved in this case, have been necessarily repealed, and the questions of law propounded to this court by the Circuit Court of Appeals must be answered in the affirmative.

POINTS *and* AUTHORITIES.

I.

The question certified by the Circuit Court of Appeals to this court must be answered in the affirmative, inasmuch as all prior legislation with reference to the possession of intoxicating liquors in the Indian Country, and especially any penalties for such offense, are unquestionably repealed by the National Prohibition Act.

The most cursory examination of the Acts of Congress, which we have set forth in the statement, will show that the prior acts relative to the possession of intoxicating liquors, as applied to the Indian Country, are exactly and fully covered by the National Prohibition Law. Indeed, the latter act covers everything comprehended in the former acts, necessarily resulting in a repeal.

The Act of May 25, 1918, provides:

> On and after September first, nineteen hundred and eighteen, *possession* by a person of intoxicating liquors in the Indian Country where the introduction is or was prohibited by treaty or Federal Statute shall be an offense and punished in accordance with the Acts of July twenty-third, eighteen hundred and ninety-two, * * * and January thirtieth, eighteen hundred and ninety-seven.

Section 3, Title II, of the National Prohibition Law, provides:

> No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or *possess* any intoxicating liquor except as authorized in this act.

Section 25, Title II, of the same act provides:

> It shall be unlawful *to have or possess* any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property.

No instance can be found where a later act more completely covers an earlier one than that now presented. It necessarily follows, therefore, that the one repeals the other.

In the very recent case of *United States* v. *Yugoniviteh*, 256 U. S. 450, 65 L. ed. 1043, this court has spoken on the subject, and laid the question at rest.

In that case, the question was before this court as to whether or not the National Prohibition Act and section 35 thereof, *supra*, had the effect of repealing numerous sections of the Revenue Laws. In that case, the indictment charged violation by the defendants of sections 3257, 3259, 3281 and 3282, of the United States Revenue Statutes, and this court found it unnecessary to advance any extended reason to show that the later act had the effect of re-

pealing all of the sections involved except in the first named section. This section made it a criminal offense for any one to defraud or attempt to defraud the United States of a tax on spirits distilled by one carrying on the business of a distillery. The count of the indictment charging a violation of this last mentioned section was given extended notice by this court, for the reason that the court found that it was inconsistent with the later act to require a tax on distilled spirits, even though such spirits were distilled contrary to law, and that, therefore, it would not be incompatible to punish a person for attempting to defraud the government of the tax, regardless of whether the spirits were distilled in a lawful distillery, or in defiance of the law. However, the court found, and shows in its opinion, that while this is true, yet that the later law also carries penalties of its own, and that such penalties are not so harsh as those prescribed under the section of the old law then under consideration, and seems to have been influenced to this conclusion very largely because of the fact that the penalties imposed under the late law were not so harsh as those under the old law.

In this connection, we desire to call attention to the first count of the indictment this court had under consideration, which was for defrauding, or attempting to defraud the United States of a tax on distilled liquor. We can readily see where a decision that the statutes involved in the other counts were

repealed would not be so strong here, for the reason that it may be said that the whole system of regulating distilleries, and having them registered, and placing a sign on them stating that they were "registered distilleries," and giving bond and otherwise complying with the acts, were wholly inconsistent and repugnant after the passage of the law that made distilling illegal, and made it impossible to register them, or give bond, or make other compliance demanded by the old law. But, in the case of defrauding the government of a tax on distilled spirits, the question of a repeal of that section was not so apparent, and became less so, when the court *in limine* felt constrained to hold and cite authorities showing that Congress had the right to tax intoxicating liquors, whether made legally or not. So, that this may appear, we quote now from the opinion, showing the holding of this court, where it is said:

> That Congress may, under the broad authority of the taxing power, tax intoxicating liquors notwithstanding their production is prohibited, we have no question. The fact that the statute in this aspect had a moral end in view as well as the raising of revenue presents no valid constitutional objection to its enactment.

After having held as above, this court then follows with the enunciation of the principles of law, establishing our contentions, saying:

> The question remains concerning the applicability of section 3257, involving the right to punish for attempting to defraud the United

States of a tax. Did Congress intend to punish such violation of law *by imposing the old penalty* denounced in section 3257, or as provided *in the new and special provision enacted in the Volstead Act?*

It is the contention of the government that section 35 saves the right to prosecute as to taxes, as well as the acts charged as violative of the other sections of the Revised Statutes, because of the phrase with which the section concludes. "* * * nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing law."

It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when *clearly inconsistent with the earlier enactments. United States* v. *Tynen*, 11 Wall. 88, 20 L. ed. 153. In construing penal statutes, it is the rule *that later enactments repeal former ones practically covering the same acts, but fixing a lesser penalty.* The concluding phrase of section 35, by itself considered, is strongly indicative of an intention to retain the old laws. But this section must be interpreted in view of the constitutional provision contained in the 18th Amendment, and in view of the provisions of the Volstead Act intended to make that amendment effective.

Having in mind these principles, and considering now the first count of the indictment, charging an attempt to defraud and actually defrauding the government of the revenue tax, we do not believe that the general language used at the close of section 35, evidences the inten-

tion of Congress *to inflict for such an offense the punishment provided in section 3257*, with the resulting forfeiture, fine and imprisonment, and at the same *to authorize the prosecution and punishment under section 35, enacting lesser and special penalties* for failing to pay such taxes by imposing a tax in double the amount provided by law, with an additional penalty of $500 on retailers and $1,000 on manufacturers. Moreover, the concluding words of the first paragraph of section 35, as to all offenses charged, must be read in the light of established prnicipies governing the provisions of the Volstead Act itself, making it unlawful to possess intoxicating liquor, for beverage purposes, or property designed for manufacturing such liquor, and providing for its destruction. We agree with the court below that while Congress manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power, *it did not intend to preserve the old penalties prescribed in section 3257 in addition to the specific provisions for punishment made in the Volstead Act.*

The case at bar, it seems to us, presents a situation which comes squarely within the principles laid down by this court in the case just cited, and that every word there said as to the construction of the statutes, and particularly section 35 of the National Prohibition Act, called the "repealing clause," is peculiarly applicable here.

When the Act of July 23, 1892, prohibiting the introduction and sale of intoxicating liquor in the

Indian Country, and when the amendments thereto were made, making it an offense for any person to have intoxicating liquor in his possession, were passed, it was no violation of the Federal law in any other parts of the country to transport whiskey, introduce it from one place to another, or to possess it; in fact, the whole policy of the government was otherwise. The making and selling of whiskey seems almost to have been encouraged, for the government received a very large part of its revenues from these sources, but the government felt that, in the Indian Country it not only had the right, but it was its duty, to pass the laws enumerated, and to fix penalties for the violation thereof; but after the passage of the Eighteenth Amendment to the Constitution, which was followed by the National Prohibition Act vitalizing that amendment, and which went into every conceivable situation regarding intoxicating liquor and absolutely made it illegal, and an offense against the United States to make, sell, transport or possess (with certain exceptions not material here) intoxicating liquor in any parts of the United States or its possessions, then it is certainly difficult for the average mind to see how it could be reasonably contended that Congress had in mind to keep in force those old statutes affecting only small portions of the United States, after so comprehensive a measure had been passed fully covering the entire subject-matter, and applying to all parts of the United States and all persons therein.

In the preceding case, this court cites the early and leading case of *United States* v. *Tynen*, 11 Wall. 88, 20 L. ed. 153, which has perhaps been cited oftener, and in more jurisdictions, than other cases upon the underlying questions.

In that case, stating the relative provisions of the two acts involved, and announcing the principles decisive of the case at bar, the court said:

> In the present case the questions presented have ceased to be material, and, consequently, it has become unnecessary to determine them, for, since they arose in the Circuit Court, Congress has passed a statute amending the naturalization laws, and prescribing certain punishments for their violation, which has worked a repeal of the provisions of the 13th section of the Act of 1813, Statutes at Large, 809. That statute, which was approved on the 14th of July, 1870, declares not only that the commission of the several acts *mentioned in the 13th section of the law of 1813* shall constitute a felony, but also a great number of other acts of fraudulent character in connection with the naturalization of aliens *shall constitute a similar offense*, and has made the infliction of a larger punishment for each discretionary with the court. The Act of 1813, imposes as punishment, either the imprisonment or fine, at the discretion of the court. The Act of 1870 authorizes either of the these punishments, or both, in like discretion of the court. The Act of 1813 allows the imprisonment to run between three and five years, and the fine to extend between $500 and $1,000. The Act of 1870 fixes the imprisonment between

one and five years, and the fine between $300 and $1,000.

There is no express repeal of the 13th section of 1813 declared by the Act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject, the rule is to give effect to both if possible. But if the two acts *are repugnant in any of their provisions*, the later act, without any repealing clause, *operates to the extent of the repugnancy as a repeal of the first;* and even where two acts are not in express terms repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was a substitute for the first act, it will operate as a repeal of that act. *Davies* v. *Fairborn*, 2 How. 236; *Bartlett* v. *King*, 12 Mass. 537; *Com.* v. *Cooley*, 10 Pick. 37; *Norris* v. *Crocker*, 13 How. 429; Sedgw. Stat. Law, 126.

Now, between the provisions of the Act of 1813 and the Act of 1870 there is a *clear repugnancy*. The first act makes the punishment for the offenses designated, imprisonment or fine. It provides that the punishment shall be one or the other, and in so doing declares that it shall not be both. The second act allows both punishments in the discretion of the court; it thus permits what the first law prohibits.

Again: the Act of 1913 provides that the imprisonment, when imposed as a punishment, shall not be less than three years, and may be extended to five. The act of 1870 allows the imprisonment to be fixed at one year, and from that period upwards to five years. In this, also, it permits what the first act forbids.

> Again: the Act of 1913 declares that the fine, when imposed, shall not be less than $500. The Act of 1870 allows the fine to be as low as $300, thus authorizing what the first act declares shall not be done.
>
> When repugnant provisions like these exist between two acts, *the latter act is held, according to all authorities, to operate as a repeal of the first act*, for the latter act expresses the will of the government as to the manner in which *the offense shall be subsequently treated.*

The case at bar falls squarely within the preceding case, as well as the *Yuginovich* case. In the instant case, under the former acts of Congress, the maximum punishment is by imprisonment for not more than two years, and by a fine of not more than three hundred dollars for each offense, and with a minimum punishment for the first offense of imprisonment of not less than sixty days, and a fine of not less than two hundred dollars. Under the National Prohibition Act, the punishment for the same offense is a fine of not more than five hundred dollars for the first offense; for the second offense, a fine of not less than one hundred dollars, or by imprisonment for not more than ninety days, and, for any subsequent offense, a fine of not less than five hundred dollars, and imprisonment for not less than three months nor more than two years. We have, therefore, exactly the same situation as presented in the case just preceding, and there is no escape from the conclusion that the National Prohibition

Law repeals, supersedes or modifies, the former acts of Congress so far as the penalties that are to be prescribed.

In *District of Columbia* v. *Hutton*, 143 U. S. 18, 36 L. ed. 60, there is found another strong case by this court, which fully sustains our contention. It meets every contention that can be made against our position, controlling the case at bar in our favor in every respect.

The second syllabus reads as follows:

> Where two acts are *repugnant in any of their provisions*, the later act, without any repealing clause, *operates to the extent of the repugnancy* as a repeal of the first.

The court said:

> We are not unmindful of the rule that repeals by implication are not favored. But there is another rule of construction equally well settled which we think applies to this case. Stated in the language of this court in *United States* v. *Tynen*, 78 U. S. 11 Wall. 88, it is this: "When there are two acts on the same subject, the rule is to give effect to both if possible. But if the two acts are *repugnant in any of their provisions*, the latter act, without any repealing clause, *operates to the extent of the repugnancy as a repeal* of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. *Mur-*

dock v. *Memphis*, 20 Wall. 590, 617; *Tracy* v. *Tuffly*, 134 U. S. 206, 223; *Fisk* v. *Henarie*, 142 U. S. 459.

Meeting the contention that it was the intention of Congress to keep the former act alive, and not to repeal the same, but nevertheless giving repealing effect to the later act, this court said:

> It is contended, however, that by the act of January 31, 1883, (22 Stat. at L. 412, Sup. to Rec. Stat. (2nd. ed.) 397), Congress recognized said §354 as still subsisting law, and that consideration should compel a reversal of the judgment below. We are not impressed with this contention. The object of the act just referred to was to abolish the detective force established by §340 of the Revised Statutes relating to the District of Columbia, and to increase the police force in certain respects. * * *
>
> It is manifest, however, from an inspection of this section, that there was recognition in it by Congress that said §354 was still subsisting law. *But even if Congress had supposed that section was still the law*, when, as a matter of fact, it had been repealed, it would make no difference in this consideration. * * * The question is, *Was §354 repealed by the Act of 1878?* That is a judicial question *to be determined by the courts*, upon a proper construction of that section and subsequent legislation upon the same subject-matter, and *is not for the legislative branch of the government to determine.*

In *United States* v. *Stafoff*, 268 Fed. Rep. 417, after affirmed by this court, as we shall later show, all the underlying principles are clearly stated.

In that case, there was an indictment under former revenue statutes, existing long prior to the National Prohibition Act.

Stating the effect of the provision that existing statutory provisions are but declaratory of the general law concerning appeals by implication, the court said:

> Section 35, Title II, of the Volstead Act, provides that all existing statutory provisions which are not inconsistent with the provisions of the Volstead Act are not to be held as repealed thereby, but to be additions to such act. Conversely it follows that there is a repeal of all former existing laws *when such former laws are inconsistent.* The provisions are *only declaratory of the general law*, if the new law is inconsistent with the old law on the same subject.

Stating the rule to be applied, the court further said:

> Holding that sections 3258, 3279 and 3281, R. S. (Comp. Stat. §§5994, 6019, 6021), were repealed by the Volstead Act, Judge SMITH, in the case of *United States* v. *Windham*, (D. C.) 264 Fed. loc. cit. 377, said:
>
> "The general rule for the construction of statutes is that, when a later statute is enacted *inconsistent with* a preceding statute and covering the entire ground of the subject-matter, it supersedes and *impliedly repeals* the preceding statute. Especially is this the case when the later statute imposes penalties *of less severity* for the same offense; the rule in favor of clemency being that, where different penalties are imposed for the same offense, the lighter penalty, when

imposed in the later statute, *is presumed to supersede the earlier and heavier.*"

There can, of course, be no manner of doubt as to the correctness of the applicatory rule as stated by Judge SMITH, in the above excerpt. *U. S.* v. *Tynen*, 11 Wall. 88, 20 L. ed. 153. * * *

A test that is fair, and I think all embracing *vel non*, may be applied in the case at bar by considering whether the acts charged against defendant under sections 3258 and 3282 are provided for and made punishable by the Volstead Act. If he may under the Volstead Act be punished *(a)* for setting up a still, and *(b)* for having in his possession mash fit for the production of distilled spirits, then he may be punished under two laws for identically the same act. If such condition exists, it would in my opinion constitute an inconsistency meet for the application of the rule of repeal by implication, and one which falls precisely within the purview of the rule which I have quoted above.

Opposite to this question it will be noted that section 25 of Title II, of the Volstead Act says:

"It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title, or which has been so used, and no property rights shall exist in any such liquor or property."

It follows that, if there has been actual manufacture of liquor, the defendants can be punished for the act under the first clause of section 29 of the Volstead Act. If they have not actually made distilled spirits, but simply had

in their possession a still adapted and designed for the making of such spirits, absent a permit allowing them to make the same, or if they had in their possession any mash so adapted and designed, in either case the still (whether set up or not set up) constitutes property within the meaning of section 25, and upon conviction the defendants may for either defense be punished under the provisions of the second clause of section 29 of Title II of the Volstead Act.

It ought to be fairly obvious that no one should be liable for the same act *to punishment under two sections of the criminal statutes.* Neither ought it to be a greater crime, or a crime punishable by a more infamous or severe punishment, to intend to commit, or to make preparation for the commission, of an offense, than it is to commit the offense itself. In other words, if a man manufacture liquor, either wine, beer or whiskey, he is punishable for the first offense by a fine, or a jail sentence; but (if the contention of the government is correct) if he merely set up a still, or merely has mash in his possession, he may be sentenced to the penitentiary for the first offense for a term as great as two years, regardless of whether he had actually made liquor. In no jurisdiction has an assault with intent to kill been ever regarded as more heinous, nor has it ever been more severely punished, than has wilful murder itself. I cannot bring myself to think that Congress had in mind so anomalous a situation. Rather I am constrained to believe Congress had in mind the very situation which has arisen here; that is, that inevitably there would be a

largely increased number of violations of the law by the use of the necessary paraphernalia in the forbidden manufacture of liquor. And that Congress did not intend (based upon the record of the violation of this law, as compared with the total population) some one-tenth of 1 per cent of the inhabitants of the United States would be annually incarcerated in the penitentiary.

So far as I can see, the Volstead Act covers and punishes, not only the acts charged against the defendants here, but also every other act and situation which can possibly arise. Without more, I conclude that the demurrer to the counts which attempt to charge offenses under the provisions of sections 3258 and 3282, R. S., ought to be sustained.

In *United States* v. *Remus*, 283 Fed. Rep. 685, afterwards affirmed by this court, a repeal of similar statutes to the ones now under consideration, was sustained. The first syllabus, reflecting the holding of the court, reads as follows:

Rev. St. §3242 (Comp. St. §5965), making it an offense to carry on the business of rectifier, wholesale liquor dealer, or retail liquor dealer, without having paid the special tax therefor, was repealed by National Prohibition Act, Title II, §35, so far as it relates to manufacturers or dealers in liquor for beverage purposes in violation of that act.

Sustaining this repeal, the court said:

This provision was held by the Supreme Court in *United States* v. *Yuginovich*, 256 U. S.

> 450, * * * to repeal section 3457, R. S., * * * in the case of one who makes liquor for beverage purposes without paying the tax. * * * Section 3257 denounces the non-payment of the tax with intent to defraud by the distiller, and is in *pari materia* with section 3242. There is no doubt that the effect of section 35 of Title II, of the National Prohibition Act *is the same upon each.* The result is that, * * * one who deals in liquors for beverage purposes is liable to the various penalties *prescribed* by the National Prohibition Act, but *not to those of section 3242.*

In the cases of *United States* v. *Stafoff*, No. 26, *Brooks* v. *United States*, No. 197, *United States* v. *Remus*, No. 403, No. 7 Advance Opinions, 67 L. ed., February 1, 1923, these cases being consolidated, this court affirmed the cases of *United States* v. *Stafoff*, and *United States* v. *Remus*, *supra*, making the decisions of the courts below those of this court.

Speaking with reference to the first case named, this court said:

> In the first of these cases Stafoff was indicted with another for having had in their possession a still intended for the production of distilled spirits for beverage and commercial purposes, without having registered it with the Collector of Internal Revenue, as required by Rev. Stat. §3258; * * * and in the second count for having unlawfully manufactured on premises other than an authorized distillery a mash fit for the production of distilled spirits, to-wit, whiskey, contrary to Rev. Stat. §3282. * * * A demurrer to these counts was sustained

(268 Fed. 417), and the United States brings the case here under the Criminal Appeals Act of March 2, 1907. * * *

No. 26, judgment affirmed.

Speaking with reference to the case of *United States* v. *Remus, supra,* this court said:

> In the third case, Remus and his associates were charged in six counts with having carried on the business of a wholesale liquor dealer, that of a retail liquor dealer, and that of a rectifier, without having paid the special tax as required by law. Rev. Stat. §3242. * * * A demurrer to these counts was sustained. 283 Fed. 685. The United States took a writ of error under the Criminal Appeals Act.
>
> In *United States* v. *Yuginovich*, 256 U. S. 450. * * * It was decided that §§3281 and 3282 *were repealed by the later law,* at least as to the production of liquor for beverage purposes. Since that decision, and with reference to it, as appears from House Rep. No. 224, 67th Congress, 1st session, and the debates, 61 Cong., Record, Par. 3, pp. 3095, 3096, the act supplemental to the National Prohibition Act was passed. Act of November 23, 1921, Chap. 134, §5, 42 Stat. at L. 222, 223. By §5 of this statute all laws in regard to the manufacture of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and remain in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are in direct conflict with any of the provisions of the National

Prohibition Act or this act. (But if an act violates both of the former and the latter, a conviction under one is a bar to a prosecution under the other.) It does not purport to construe the National Prohibition Act as leaving in force what this court has declared *to have been repealed.* It could not in this way give a retrospective criminality to acts that were done before it was passed, and that were not criminal except for the statutes held to have been repealed. * * * Of course, a statute purporting to declare the intent of an earlier one might be of great weight in assisting a court when in doubt, although not entitled to control judicial action. But that is not this case. The decision in *United States* v. *Yuginovich, must stand for the law* before November 23, 1921. In that case, besides what we have mentioned, it was held also that the penalty imposed by Rev. Stat. 3267, * * * on a distiller for defrauding the United States of a tax on the spirits distilled by him, *was repealed.* So far as liquor for beverage purposes the *same reasoning must apply* to the penalty in §3242, for carrying on the business of rectifier or wholesale or retail liquor dealer without having paid the special tax imposed by law.

This court then proceeds to hold that all acts committed before the supplemental legislation noted, were governed by the *Yuginovich* case, and on the basis that the acts involved had been repealed, and that all acts prior thereto, involved in the indictment, could not be made criminal, since there had been a repeal by the National Prohibition Act.

Speaking in this connection, and referring to the *Stafoff* case, this court said:

> The decision in Stafoff's case dealt with conduct before the date of the supplemental act, *and was right*. The keeping of a still for beverage purposes, contrary to §3258, is within the principle of the *Yuginovich* case, and the addition of the words "and commercial" to the statement of the purposes does not seem to us enough to take it out. The reference to this section in Title III, §8, of the Prohibition Act, may have been inserted simply for greater caution. It is one of the several considerations tending to a different conclusion in *United States* v. *Yuginovich*, but, as they did not prevail, cannot prevail now.

This court, therefore, on all counts in the *Remus* case, involving acts which preceded the Supplemental Act of Congress, held that the provisions of the National Prohibition Act had repealed all former acts inconsistent with, or repugnant thereto.

Speaking of the case of *Brooks* v. *United States*, this court said:

> The case of *Brooks* comes here on a certificate from the Circuit Court of Appeals for the Ninth Circuit. Brooks was convicted under the above mentioned §§3258 and 3282, and also under Rev. Stat. §3281, * * * for having carried on the business of a distiller without having given bond, as required by law. The third and fourth counts under §3282 respectively charged the making of a mash as above, and the separating by distillation of alcholic

> spirits from a fermented mash. The questions certified are whether the three sections mentioned are *repealed by the National Prohibition Act* of October 28, 1919, Chap. 85, 41 Stat. at L. 305, * * * and whether, if they are repealed, the cause should be remanded, with directions to enter judgment and impose sentence under the last mentioned act.

With reference thereto, this court further said:

> There remains the questions certified in *Brooks* v. *United States*. They are somewhat broader than we indicated in our summary statement, as they include the Revenue Laws generally as well as the §§3258, 3281 and 3282. The general question manifestly is too broad to require an answer. From the summary given of the indictment, we infer that what we have said is sufficient with regard to the sections named. The fourth question—whether, in view of what we have decided, the case should be remanded for judgment and sentence under the National Prohibition Act—*must be answered, No.* The indictment plainly purported to be drawn under the old law, and it would be unjust to treat the conviction as covering an offense under a law of fundamentally different policy if facts could be spelled that ought or might fall within the latter, although alleged with no thought of it, or any suggestion to the accused that he must be prepared to defend against the different charge. * * *
>
> No. 197, questions 1, 2 and 3, as limited above, answered, Yes. Question 4, answered, No.

This case, therefore, one of the very latest utterances of this court, fully sustains our contentions,

and conclusively establishes the principles, which repeal the former Act of Congress. Wherever and whenever the question has been presented, this court has uniformly held that the Volstead Act has repealed every provision of the National Prohibition Act inconsistent with its provisions.

Unquestionably, if the National Prohibition Act had been silent as to any repeal, no question would ever have been raised as to whether or not the former Acts of Congress, covering the possession of intoxicating liquors in the Indian Country was repealed. The patent repugnancy would have settled the question that the former acts were repealed.

As we have stated, however, the repealing clause of the National Prohibition Act is nothing more than a statutory incorporation in the act of the ordinary and universal rules of interpretation of statutes, and involves no more than a statutory incorporation of the rule of inconsistency or repugnancy as applicable to the National Prohibition Act, which would have applied without the express language contained therein. Were it not, therefore, for the peculiar language used by the act, doubtless no question ever would have been raised as to its having repealed the former act now involved.

The pertinent part of section 35, Title II, reads as follows:

> All provisions of the law that are *inconsistent* with this act are repealed *only to the extent of such inconsistency.* * * * Nor shall this act

> relieve any person from any liability, civil or criminal, heretofore or hereinafter incurred under existing law.

Now, let us take a statement of the underlying principles from one of the standard textbooks, which reflects the holdings of the courts, and we shall at once see that there is no efficacy in the peculiar language used in the preceding section, preventing the repeal of the former Acts of Congress as contended by us.

In section 179, 25 Ruling Case Law, 930, it is said:

> The general rules relating to the repeal of statutes by implication are as applicable to penal statutes as they are to any other class. As is true of other statutes, a penal act, in order to repeal a prior one, must relate to the same subject and have the same object in view. There can be no implied repeal of a statute relating to one offense by a later statute relating to a different, though similar offense. But if a criminal act deals with the same subject as a prior act and *is inconsistent with and repugnant to* the prior act, the latter will be repealed *to the extent of the inconsistency.* Thus, where the latter statute defines an offense that is described in an earlier statute, *the earlier statute is repealed;* and the same result follows where the new statute *changes the penalty,* as where punishment by fine or imprisonment is changed to fine and imprisonment.

The same result, therefore, would really have been reached if the National Prohibition Act had

remained entirely silent as to any repeal, leaving it entirely to implication. There is, however, when the language of section 35 is carefully read and analyzed, a positive incorporation of the rule of repugnancy or inconsistency incorporated in the act itself, although it was not necessary to accomplish the repeal.

When we consider the cases, which we have cited in the preceding part of this brief, it does not seem possible to believe that Congress intended that these acts, with their different penalties, should remain in force at the same time, covering the same section of the country. Yet, that has been the contention of the government. It is utterly inconsistent to believe that a person living, as these defendants did, in the suburbs of the City of Tulsa, one of the largest cities in the State of Oklahoma, where the mere fact of having in their possession some whiskey, coupled with the fact that the Osage Nation, or reservation, extended to and bordered on that city, should render them liable to the penalties of the old law, which would have permitted a fine and two years imprisonment, when, in practically every other portion of the United States, a fine for the first offense could not have exceeded $500.00. It is more reasonable to believe that, after the passage of the Eighteenth Amendment, it had been made, not only possible, but mandatory, to enact a law affecting all National Territory, and all the people therein. Congress intended by the passage of the National Pro-

hibition Act to wipe out all other laws, which were entirely and specifically covered by the new act, and which provided penalties either greater or less than those provided in any former of old acts. When the Eighteenth Amendment was passed, and became a part of the Constitution of the United States, the Indian Country ceased to exist, as a part of the territory over which Congress could legislate. When that amendment became a part of the organic law of this country, Congress was then empowered to legislate with reference to every inch of territory, whether in the States, Territories or insular possession of the government, and there was certainly no indication of a different power to exercise in merely the Indian Country. We submit, therefore, that the acts relied on by the government in the present case, in order to sustain any conviction, must be held to have been repealed by the National Prohibition Act.

II.

The Acts of 1892, 1897 and 1918 are general, and not special, and the rule of inconsistency or repugnancy, in creating a repeal by implication, where a later act follows another, covering the same subject-matter, applies in its fullness.

It was contended in the courts below that the Acts of 1892, 1897 and 1918, are special or local acts, and that, therefore they are not repealed by such a

general act as the National Prohibition Act. This contention cannot be sustained.

Until the passage of the National Prohibition Law, Congress was limited in its power and scope in passing laws like those now involved. Congress could not prohibit the manufacture, sale or possession of intoxicating liquors in the various states, except so far as there existed in such state a government reservation, Indian Country, or some similar situation. However, such limitation did not make of an act passed by Congress, covering generally, as those acts did, such territory or places, concerning which Congress could legislate, a special act, although the vigor of the act was limited as to territory, places and classes of people. The acts involved were co-extensive with the power of Congress, and were not, and could not be, special. Counsel in the courts below recognized that this was the only possible contention that could be made, which would sustain the indictment, and if that proposition fails, then the question propounded by the Circuit Court of Appeals must be answered in the affirmative. An examination of the authorities, we submit, will show that it is without substance.

In 36 Cyc 985, the definition of a general statute is thus given:

> A general or public act is a universal rule affecting the entire community or class of the community covered by it. It is not necessary, however, in order to constitute a public act, that

it should be equally applicable to all parts of the state. It is sufficient if it extends to all persons doing or omitting to do an act *within the territorial limits* described in the statute.

In 26 Am. & Eng. Ency. Law (2nd ed.) 530, it is said:

> A public act, according to Blackstone, is a universal rule that regards the whole community. If by this it is meant that the act must apply to *the whole territory,* or the *entire people* subject to the legislative jurisdiction, the definition has undergone considerable modification in the United States, as it is now held that an act which in anywise affects the public at large, *although operating in the limits of a particular locality,* is as much a public act as one *operating throughout the entire state.*

In section 7, 25 Ruling Case Law 763, it is said:

> A public act, according to Blackstone (1 Bl. Com. 86), is a universal rule, that regards the whole community. In this country, it has been said, the disposition has been, on the whole, to enlarge the limits of the class of public statutes and to bring within it all enactments of a general character, which in any way affect the community at large. While public acts are usually general in their character and operation, and equally applicable in all parts of the state, a statute will not be deemed private merely because it extends *only to particular localities or classes of persons.*

These general definitions ought to settle the question, as they clearly establish that the Acts of

1892, 1897 and 1918, are general, and not special. We desire, however, to call attention to a few cases, which are decisive of the question, and fully establish our contention.

In the case of *Forty-three Gallons of Cognac Brandy,* 11 Fed. Rep. 47, there is found a case exactly in point. This case involved the question as to whether the first section of the Act of 1834, and the act itself, involving the introduction of spiritous liquors or wines into the Indian Country, was a general act, or special or local. Under the provisions of the Revised Statutes, if general, it was repealed, and, if special or local, it was not repealed. Unequivocally holding the statute general, and thus repealed, the court said:

> The point most discussed on the hearing is one which was not brought to the attention of the court below, but which may nevertheless be raised here, as it goes to the question whether there is any statute of the United States now in force which locates and defines the extent or boundaries of the Indian Country. The first section of the Act of Congress of June 30, 1834, (4 St. 729), defines the Indian Country as follows: "All that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi River and not within any State, to which the Indian title has not been extinguished." There is no other stautory definition or description of the Indian Country.

Our first inquiry will be, is the first section of the Act of June 30, 1834, still in force, or has it been repealed by the enactment of the Revised Statutes of the United States? The section is not found, either in form or substance, re-enacted in the Revision. It is entirely omitted therefrom. Other portions of that law are embodied in the Revision, as will be seen by reference to sections 2129, 2130, 2131, 2132, 2133, 2134 and 2155.

The Revised Statutes, §5596, provide that:

"All acts of Congress passed prior to said first day of December, 1873, any portion of which is embraced in said Revision, are hereby repealed, and the section applicable thereto shall be in lieu thereof; all parts of such acts not contained in said Revision having been repealed or suspended by subsequent acts, or not being *general* or permanent *in their nature*. Provided, that the incorporation into said Revision of any general or permanent provision, taken from an act containing other provisions of a private, *local*, or temporary character, shall not repeal or in any way affect any provision of a private, *local*, or temporary character contained in any of said acts, but the same shall remain in force," etc.

It is plain that the first section of the act of 1834 is repealed by this legislation, unless it comes within the proviso just quoted, as being private, *local*, or temporary. The Act of 1834, known as the trade and intercourse act, considered as a whole, was, in my judgment, a public act, permanent in its character, and of great general importance. It was neither *local*, private, nor temporary, within the ordinary sig-

nification of those terms, as used in the acts of Congress. It established an elaborate and comprehensive code, regulating trade and intercourse with the Indian Tribes, and provided for the punishment criminally of all persons violating any of its provisions. Looking at the entire act, no lawyer would think of classing it among the statutes usually denominated *local,* private or temporary. But it is said that while the general provisions of the act are of a public and general character, the first section is both local and temporary.

It is insisted that the said section is local, because those parts of the acts dependent upon it for their applicability are by said section *limited to a portion* of the United States, and *not to the whole.* This point is not well taken. The statute concerned all the people of the United States. It binds all within the jurisdiction of the law-making power, *although its operation may be limited to the territory described.* The proper definition of a private or *special* statute is one which relates to certain individuals or particular classes of men. Statutes which relate to matters of public policy, as contradistinguished from those which relate to private interests and particular individuals only, are public acts; and hence it has been held that statutes for the establishment of towns and counties, the erection of court-houses, bridges, and ferries, and the like, are public acts. So, also, are acts, which, *though affecting a particular locality, apply to all persons.* Upon this general subject, see, Sedgwick, St. & Const. 30 to 33, inclusive; *Clark* v. *City of Janesville,* 10 Wis. 186; *Iowa County Seat Case,* 9 Wis. 279.

> It follows that whether we consider section 1, of the act of 1834, by itself (as I think we must) as a part of the entire act, and, therefore, as constituting, it must in either case be held that it is a *general* and not a *local* statute.
> * * *
> I am constrained, therefore, to hold that section 1 of the act of 1834 was repealed by the Revised Statutes of the United States, and that consequently the description of the Indian Country found in that section is no longer a part of the law of the land.

The Act of July 23, 1892, was in its essential features enacted by the Act of July, 1832, 4 Statutes at Large 564, and was revised by the Acts of March 15, 1864, 13 Statutes at Large 29, and of February 27, 1877, 19 Statutes at Large 244. In its essential features, it has stood on the Statute books of the United States, therefore, since 1832, and was there, when the Act of 1834 was passed. In the preceding case, it was practically conceded that the other provisions of the Act of 1834 were of a general, and not special, nature, but it was sought to have the definitive section of the act declared a special or local law. This legislation, therefore, relative to Indian Country, having started, when the proportion of the country that was inherently Indian was very large, would surely not then have been looked upon and declared a special or local statute. It cannot, however, become any the less general, because the limits of the Indian Country have contracted, and the places have grown fewer since that time.

In *United States* v. *Twelve Bottles of Whiskey*, 201 Fed. Rep. 91, the Circuit Court of Appeals for the Fifth Circuit, recognizes the general character of these acts, where it said:

> The treaties with the Crow Indians, and that statute affecting them, contain no prohibition of introduction of intoxicants upon any of said Indians' lands, and promise none after the Indian title thereto is extinguished. * * * The Crow lands are subject only *to the general statute* prohibiting introduction of intoxicants into the "Indian Country;" the term including allotments so long as the legal title is in the United States. Act of July 23, 1892, c. 234, 27 Stat. 260; Act Jan. 30, 1897, c. 109, 29 Stat. 506.
>
> It is settled law that, when the Indian title to land is extinguished, such lands are no longer "Indian Country," that thereafter *the general statute* prohibiting introduction of intoxicants into the "Indian Country" no longer *propio vigore* applies to such lands, and that if the treaties or statutes by virtue of which the Indian title to such lands is extinguished do not prohibit the introduction of intoxicants thereon, or do not continue the application of *the general statute* aforesaid, it is lawful to introduce intoxicants there.

In *Clairmont* v. *United States*, 225 U. S. 556, 56 L. ed. 1201, this court applied the doctrine in the first case cited, 11 Fed. Rep. 47, where it treated section 1 of the Act of 1834, as repealed, and necessarily held that it was a general statute.

After having quoted the excerpt set forth in the Federal Reporter, giving the text of section 1, of the Act of 1834, this court said:

> This portion of the Act of 1834 was not re-enacted in the Revised Statutes, though other parts of the statute were, *and hence repealed by §5596* of the revision.

Under the decisions preceding, and under the general principles of law applicable, there can be no question but that the Acts of 1892, 1897 and 1918 are general statutes, and are in no sense special or local. Being in any respect inconsistent with, or repugnant to, the provisions of the National Prohibition Act, they are necessarily repealed to the extent of such inconsistency or repugnancy. As to such inconsistency or repugnancy, there has never been any question, and the sole contention in the courts below has been that those former Acts of Congress were special or local, which alone has been recognized could take from the general rule, resulting in a repeal by implication. Being general, as we have abundantly shown, and being so diametrically antagonistic and inconsistent, there can be no escape from the conclusion that they have been repealed by the National Prohibition Act.

III.

If the contention of the government be sustained that the former Acts of Congress are not repealed by the National Prohibition Act, the two co-existent acts would violate the Fifth Amendment to the Constitution of the United States, and the repeal of the former by the latter must necessarily be sustained.

The Fifth Amendment to the Constitution of the United States forbids any one being placed in jeopardy twice for the same offense. If the contention of the Government in the courts below be sustained, the former acts and the National Prohibition Act, all being general, it will result in persons who happen to be in what is called the "Indian Country" being subjected to the liability of being prosecuted and punished twice for the same offense, or being convicted twice upon what are substantially the same facts. This is the very purpose of the Fifth Amendment to prevent.

In section 114, 8 Ruling Case Law 134, the general doctrine is stated as follows:

> It is an established maxim of the common law, in the administration of criminal justice, constantly recognized by the elementary writers, and courts of judicature from a very early period down to the present time, that a man shall not be brought into danger for his life or limb for one and the same offense, more than once. This rule not only prohibits a second punishment for the same offense, but it goes further, and *forbids a second trial for the same of-*

fense, whether the accused has suffered punishment or not, and whether in the former trial he has been acquitted or convicted.

In 16 Corpus Juris 233, it is said:

> That no one shall be twice put in jeopardy for the same offense is an ancient and well established doctrine. It is a part of the universal law of reason, justice and conscience. It is embodied in the maxim of the civil law, *non bis in idem*, and is embedded in the very elements of the common law, and expressed in several of its maxims. This universal doctrine was incorporated into the Constitution of the United States, which provides that no person "shall be subject to the same offense or be put twice in jeopardy of life or limb," and the constitutions of nearly all the states contain a similar provision. * * * The protection afforded by the common law and by the constitutional provisions is effective, not only against *the peril of a second punishment*, but also against *a second trial* for the same offense.

In *United States* v. *Windham*, 264 Fed. Rep. 376, the conclusion for which we are contending was reached, and the doctrine applied. The third syllabus reads as follows:

> If the Act of October 28, 1919, Tit. 2, §35, repealing inconsistent provisions only to the extent of such inconsistency, and making the regulations for the manufacture of intoxicating liquors additional to existing laws, be construed *as intended not to repeal the provisions imposing heavier penalties* on the transportation and

concealment of intoxicating liquors on which the revenue has not been paid, it would be invalid as importing *an additional penalty* for the same act, *contrary to Const., Amend. 5, prohibiting double jeopardy.*

The court said:

The question, however, arises whether the statute of October 28, 1919, expressly continues of force and refuses to repeal those sections of the Revised Statutes. By section 35 of Title 2 of the statute of October 28, 1919, it is provided that all provisions of law inconsistent with that statute are repealed only to the extent of such inconsistency, and the regulations therein contained for the manufacture or traffic in intoxicating liquors are to be construed as an addition to existing laws, and further that the statute should not relieve any person from any liability, civil or criminal, theretofore or thereafter incurred under existing law.

In construing this section, it must be assumed *that Congress had in mind the existing rules of law, as well as the rules of statutory construction.* Under the provisions of the Fifth Amendment to the Constitution of the United States, prohibiting the placing of a party twice in jeopardy, and similar constitutional provisions, it has been held that the constitutional inhibition *to any attempt to try a man twice and to punish him twice for the same offense.* To such extent, therefore, as the last statute of October 28, 1919, *would appear to cover and include the same offense mentioned and described in the previous sections of the Revised Statutes of the United States, and to provide a punishment for them, it would be imposing different*

penalties and different punishments for the same offense, against the constitutional inhibition.

In the leading case of *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872, the breadth of the protection of the Fifth Amendment is well stated, and the underlying principles clearly outlined, when this court said:

> If there is anything settled in the jurisprudence of England and America, it is that ***no man can be twice lawfully punished for the same offense.*** And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.
>
> The principle finds expression in more than one form in the maxims of the common law. In civil cases the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause. *Nemo debet bis vexari pro una et eadem causa.* It is upon the foundation of this maxim that the plea of former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action.
>
> In the criminal law the same principle, more directly applicable to the case before us, is expressed in the Latin, "***Nema bis punitur pro eodem delicto***" (2 Hawk. P. C., 377), or,

as Coke has it, "*Nemo debet bis puniri pro uno delicto.*" 4 Co., 43; 11 Co., 95b. No one can be twice punished for the same crime or misdemeanor, is the translation of the maxim by Seargeant Hawkins.

Blackstone in his Commentaries cites the same maxim as the reason why, if a person has been found guilty of manslaughter on an indictment, and has had the benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed. 4 Black., 315 (Shars.).

Of course, if there had been no punishment the appeal would lie, and the party would be subject to the danger of another form of trial. But by reason of this universal principle, that no person shall be twice punished for the same offense, that ancient right of appeal was gone when the punishment had once been suffered. The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial.

The common law *not only prohibited a second punishment for the same offense,* but it went further and forbids a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.

Hence to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defense.

In the case of *Crenshaw* v. *Tenn.*, 1 Mart. & Yerg. 122, it was held by the Supreme Court

of that state: that an indictment, conviction and punishment in a case of felony not capital was a bar to a prosecution for all other felonies not capital committed before such conviction, judgment or execution.

If in a civil case (says DRAKE, J., in *State* v. *Cooper*, 1 Green (N. J.) 375), the law abhors a multiciplicity of suits, it is yet more watchful in criminal cases that the Crown *shall not oppress* the subject, or the Government the citizen, by unreasonable prosecutions.

These salutary principles of the common law have, to some extent, been embodied in the constitutions of several states and of the United States. By Article VII of the Amendments to the latter instrument it is declared that no fact once tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law; and by Article V, that no person shall for the same offense be twice put in jeopardy of life or limb * * * nor be deprived of life, liberty or property without due process of law.

It is not necessary in this case to insist that other cases besides those involving life or limb are positively covered by the language of this amendment; or that when a party has had a fair trial before a competent court and jury, and has been convicted, that any excess of punishment deprives him of liberty or property without due course of law. On the other hand, it would seem equally difficult to maintain, after what we have said of *the inflexible rules of the common law against a person being twice punished for the same offense*, that such second pun-

ishment as is pronounced in this case is not a violation of that provision of the constitution.

It is very clearly *the spirit* of the instrument *to prevent a second punishment* under judicial proceedings *for the same crime,* so far as the common law gave that protection.

In the case of *Com.* v. *Olds,* 5 Litt. 137, one of the best common law judges that ever sat on the bench of the Court of Appeals of Kentucky remarked, "That every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of the dominant administration. * * * To prevent this mischief of the ancient common law, as well as *Magna Charta* itself, provided that one acquittal or conviction should satisfy the law; or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois* and *autrefois convict.* To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our constitution the clause in question."

In the case of *Cooper* v. *State,* in the Supreme Court of New Jersey (1 Green, N. J., 361), the prisoner had been indicted, tried and convicted for arson. While still in custody under this proceeding he was arraigned on an indictment for the murder of two persons who were in the house when it was burned. To this he pleaded the former conviction in bar, and the Supreme Court held it a good plea. It is to be observed that the punishment for arson could not technically extend either to life or limb;

but the Supreme Court founded its argument on the provisions of the constitution of New Jersey, which embodies the precise language of the Federal Constitution. After referring to the common law maxim, the court says: "The constitution of New Jersey declares this important principle in this form: 'Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.' Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. But the framers of our constitution have thought it worthy of special notice. And all who are conversant with courts of justice must be satisfied that this great principle forms one of the strong bulwarks of liberty. * * * Upon this principle are founded the pleas of *autrefois acquit* and *autrefois convict.*"

And Hawkins, in his Pleas of the Crown (pp. 515, 526), says that both the pleas of *autrefois acquit* and *autrefois convict* are grounded on the maxim that a man * * * *shall not be brought into danger* of his life *for one and the same offense more than once.*

In *Moore* v. *People*, 14 How. 13, the defendant was fined $400 under the Criminal Code of that state for harboring and secreting a negro slave. The case came to this court under the 25th section of the Judiciary Act, on the ground that the right to legislate on that subject was exclusively in Congress. The court did not concur in that view of the question. But it also was urged that the party might be subjected twice to punishment for the same offense if liable to

be prosecuted under the statutes of both state and national legislatures. In regard to this Judge McLean said, in a dissenting opinion, that "the exercise of such a power by the states would, in effect, be a violation of the Constitution of the United States and of the respective states. They all provide against a second punishment for the same act." "It is contrary," said he, "to the nature and genius of our government *to permit an individual to be twice punished for the same act.*"

Mr. Bishop, in the latest edition of his work on criminal law (Secs. 990, 991, 5th ed.), speaking of this constitutional provision, says the construction of these words is that properly the rule extends to treason and all felonies, not to misdemeanors. Yet practically and wisely the courts have applied it to misdemeanors, and that in view of the liberal construction of statutes and constitutions in favor of persons charged with crime he cannot well see how courts can refuse to apply this constitutional guaranty in cases of misdemeanor.

Chitty (Cr. L., 452-462) also drops the words "life and limb" in speaking of the pleas of *autrefois acquit* and *autrefois convict*, and declares that they both depend on the principle that no man shall more than once be placed in peril of legal penalties upon the same accusation.

If we reflect that, at the time this maxim came into existence, almost every offense was with death or other punishment touching the person, and that these pleas are valid in felonies, minor crimes and misdemeanors alike, and on the difficulty of deciding when a statute under

modern systems does or does not describe a felony when it defines and punishes an offense, we shall see ample reason for the holding that the principle intended to be asserted by the constitutional provision must be applied to all cases where a second punishment is attempted to be inflicted by a judicial sentence.

For what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never again be tried for the same offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is *the punishment* that would legally follow the second conviction which is *the real danger* guarded against by the constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can again be sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and spirit in such a case as much violated as if a new trial had been had and, on second conviction, a second punishment inflicted?

The argument seems to us irresistible, and we do not doubt that the constitution was designed as much to prevent the criminal from being punished twice for the same offense as from being twice tried for it.

We shall not undertake to call the court's attention to the numerous other cases, which might be cited, showing how broadly the Fifth Amendment

is directed against any provision of, or situation in, law, which would place one charged with a criminal offense twice in jeopardy. The preceding case by this court shows how broad and far-reaching are the underlying principles, and the contentions of the Government, so far made in this case, are clearly against the spirit and intent of that amendment.

When we consider the language of the Eighteenth Amendment, this all the more pointedly appears. It reads as follows:

> After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors *within*, the *importation* thereof into, or the *exportation* thereof from, the United States and *all territory subject to the jurisdiction thereof*, for beverage purposes, is hereby prohibited.

This amendment, and all laws enacted by Congress vitalizing it, unless clearly limited in operation, necessarily extend over every inch of territory included in, and subject to the jurisdiction of, the United States. The United States had the jurisdiction and power to prohibit the possession of intoxicating liquors in what was known as "the Indian Country" prior to the adoption of the amendment, but, when its provisions were made a part of the constitution, then there became and was no difference between "the Indian Country" and any other portions of the United States or territory subject to the jurisdiction thereof, and, when the

National Prohibition Act was passed, Congress was acting without any limitation, and with precisely the same power, and with the same objects, with reference to "the Indian Country" as any other part of the territory subject to the Government's jurisdiction. The amendment obliterated "the Indian Country" so far as the power of Congress to legislate with reference to intoxicating liquors is concerned.

Most surely it never could have been the intention of Congress to have two laws for but a small part of the territory subject to the jurisdiction of the United States, and to have but one law for all the rest, thus subjecting some of its citizens to the jeopardy and danger of two prosecutions for identically the same act, and to two punishments therefor. The National Prohibition Act necessarily applies to, and is effective in all the states of the Union, and all territory subject to the jurisdiction of the United States, and if the Acts of 1892, 1897 and 1918 are not repealed, as contended by the Government, then both must be operative in "the Indian Country," thus clearly placing any citizen charged with the offense of possession in double jeopardy of both prosecution and punishment for the same identical act, when the Eighteenth Amendment itself, as to such act of possession, has entirely effaced the distinction between "the Indian Country" and all other territory affected by the amendment. Such a result is not only contrary to every rule of

statutory construction as to repeals, but is also in the very teeth of the Fifth Amendment, and cannot be allowed.

Conclusion.

From every angle we approach the question, we can reach, it seems to us, but one result, and that is, that the question propounded by the Circuit Court of Appeals must be answered in the affirmative. To hold otherwise, it seems to us, every rule of statutory and constitutional interpretation must be violated and an oppressive and discriminating result accomplished. Even a citizen in "the Indian Country," as formerly defined, would be placed at the mercy of the whim of the prosecuting officer as to whether or not he would be incarcerated in the penitentiary and punished by fine, or be given the milder punishment of a fine. Two citizens in such territory, having committed the same identical act, having had in possession the same kind and quantity of intoxicating liquor, and at the same time, and arrested and arraigned at the same time before the same magistrate, might be prosecuted by the same district attorney, one under one statute and the other under another statute carrying different penalties. The partiality of the prosecuting officer for one, and his prejudice against the other, or other instances, might lead to such a result. It is contrary

to the very genius and spirit of our Government, and we confidently believe will never be permitted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1923.

A. P. KENNEDY AND JOHN KENNEDY, plaintiffs in error, v. THE UNITED STATES OF AMERICA. } No. 222.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

By certificate from the United States Circuit Court of Appeals for the Eighth Circuit, there is submitted to this Court the single question whether so-called "Indian Statutes," prohibiting and punishing the possession of intoxicating liquors in the Indian territory, have been repealed by the National Prohibition Act. (Chap. 85, 41 Stat. 305.)

The case arose in the United States District Court for the Western District of Oklahoma. The facts as summarized by the statement of the Circuit Court of Appeals are as follows:

> The plaintiffs in error, defendants below, were indicted, tried, convicted and each of them was sentenced to confinement in jail

for six months and to pay a fine of $1,000 for having eighteen quarts of whiskey in his possession in the Indian country, in the County of Osage, in the State of Oklahoma, on the 24th day of July, 1920, in violation of the *Act of July 23, 1892, Section 4136a, Compiled Statutes, and its amendments* (*United States* v. *Wright*, 229 U. S. 226; *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531); the Act of January 30, 1897, Section 4137, Compiled Statutes; and the Act of May 25, 1918, Section 4137a, Compiled Statutes, which made possession of intoxicating liquor in the Indian country a criminal offense and prescribed a punishment of not exceeding two years' imprisonment and a fine of not exceeding $300 for the first offense.

Each of the defendants demurred to the count of the indictment which charged this offense on the ground that the parts of the Acts cited above which created the crime of and fixed the punishment for having possession of intoxicating liquor in the Indian country were superseded and repealed before the 24th day of July, 1920, by the enactment of the National Prohibition Act of October 28, 1919, 41 Statutes at Large 305, so that the count of the indictment challenged was insufficient in law and charged no offense. The District Court overruled the demurrer; that ruling is assigned in this court as error by the defendants below, and they cite in support of that assignment Title II, Sections 3, 25, 29, 33, and 35 of the National Prohibition Act.

QUESTION PRESENTED.

The question, also stated in the words of the Circuit Court of Appeals, is:

> Was that portion of the Act of July 23, 1892, Section 4136a, Comp. Stat., as amended by the Act of January 30, 1897, Section 4137, Comp. Stat., and by the Act of May 25, 1918, Section 4137a, Comp. Stat., which made possession of intoxicating liquor in the Indian country a criminal offense and fixed the punishment therefor, repealed, superseded, or modified by the enactment of the National Prohibition Act, 41 Statutes at Large, 305, 308, Title II, Sections *3, 25, 29, 33, and 35*?

ARGUMENT.

I.

Statutes involved.

To consider properly the question submitted by the court below, a review of the Indian Statutes, and a parallel analysis of their purpose and effect with the purpose and effect of the National Prohibition Act, are necessary. For the convenience of the Court, these statutes are set forth in an appendix to this brief.

The Act of July 23, 1892, c. 234, 27 Stat. 260 (Sec. 2139, Revised Statutes), prohibits the introduction, under any pretense, of intoxicants into the Indian country. The punishment provided is imprisonment for not more than two years and a fine of not more than $300 for each offense.

The Act of January 30, 1897, c. 109, 29 Stat. 506, amends the Act of July 23, 1892, by providing that for selling, or in any manner disposing of, malt or spirituous liquors, or any essence, preparation, or article of any kind, under any name, which produces intoxication, to any Indian, the minimum punishment shall be imprisonment for not less than sixty days and a fine of not less than $100 for a first offense. (*United States* v. *Wright*, 229 U. S. 226; *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531.)

The Statute of 1897, expressing more clearly and definitely the purpose and scope of the Statute of 1892, established a minimum penalty; enlarged the list of alcohol compounds, introduction of which would violate the law, by embracing extracts, bitters, and essences; more definitely set out the meaning of "Indian" as including those of mixed blood, and defined the "boundaries of Indian country" to include Indian allotments while the titles remain in trust by the Government or during the period in which they are inalienable by the allottee.

The Act of May 25, 1918, c. 86, 40 Stat. 561, made the mere "possession" of intoxicating liquor within the Indian country an offense punishable in accordance with the provisions of the Acts of July 23, 1892, and January 30, 1897.

The offense in this case was committed in Osage County, Oklahoma, a part of the Osage Indian Reservation in what was originally Indian territory (*Joplin Mercantile Co.* v. *United States, supra; McClintic* v.

United States, 283 Fed. 781), and declared by the Act of March 2, 1917, c. 146, 39 Stat. 983, still to be Indian country.

II.

Policy of the Federal Government in Indian Legislation.

Indian Statutes are special laws operating over a restricted area and arising out of particular considerations of safety to the public and duty to a helpless people.

The authority for their enactment is found in Section 8, Article I, of the Constitution of the United States, providing:

> The Congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.

By continued legislation and executive usage the Government has attributed to itself as a superior civilized nation the power and duty of exercising fostering care and protection over the Indian. (*United States* v. *Wright*, 229 U. S. 226; *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Sandoval*, 231 U. S. 28; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 316.)

Because of the destructive effect on the American Indian of the use of spirituous liquors, shown not only in the deterioration of his own tribal peace and well-being, but in the menace to near-by white settlements when he becomes intoxicated, Congress has,

from a very early period, enacted from time to time legislation for the prevention of the introduction, under any pretense whatsoever, of any kind of intoxicants into Indian Reservations and settlements. The origin of the policy to prohibit the presence of liquor in Indian territory can be traced back to the Indian Intercourse Act of June 30, 1834, c. 161, 4 Stat. 729, 732, as amended by the Act of March 15, 1864, c. 33, 13 Stat. 29.

Then there followed the statutes of 1892, 1897, and 1918, the survival of which is brought in question by this case. They form the essential part of such legislation. They are special statutes enacted for a special purpose, and apply but to a restricted territory and to a particular class of people. (*United States* v. *Kagama*, *supra; United States* v. *Wright*, *supra; United States* v. *Sandoval*, *supra.*)

In the recent case of *La Motte* v. *United States*, 254 U. S. 570, 575, this court has called the Osage Indians "wards" of the United States. The guardianship is shown by other statutes and by the duties assumed by Indian agents to assist in the prevention of intoxicating liquors among Indian tribes.

The Act of February 14, 1873, c. 138, sec. 6, 17 Stat. 463, Revised Statutes 2045, imposes upon Indian Inspectors the duty of enforcing laws relative to Indians. Section 2140 of the Revised Statutes authorizes Indian agents, superintendents, and other specified persons to seize and summarily destroy any ardent spirits found within Indian country. (See Act of March 1, 1907, c. 2285, 34 Stat. 1017,

and Act of August 24, 1912, c. 338, sec. 1, 37 Stat. 519.) Agents acting under the Indian Office are directed as far as possible to break up "this demoralizing traffic," and to use decoys, when necessary, to secure evidence, the officer's efficiency being rated not by the number of cases he makes, but by the results he obtains in "keeping Indians and intoxicating liquor separated." (Instructions for Special Officers and Deputies, Assisting in Suppressing the Liquor Traffic Among Indians, Department of Interior, U. S. Indian Service, July, 1918.)

The Act of March 2, 1917, c. 146, sec. 1, 39 Stat. 970, provides for the seizure, libel, and forfeiture of vehicles used to introduce intoxicants into Indian country, whether used by the owner or another person.

Section 2141 of the Revised Statutes imposes a penalty for setting up a distillery in the Indian country, and places upon the superintendent or Indian agent the duty forthwith to "destroy and break up the same."

The Act of May 18, 1916, c. 125, sec. 1, 39 Stat. 124, provides that possession of intoxicants in the Indian country is *prima facie* evidence of their unlawful introduction.

Congress for many years has made special appropriations "to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to take action to suppress traffic of intoxicating liquors among Indians." (34 Stat. 328, 1017;

35 Stat. 72, 782; 36 Stat. 271, 1059; 37 Stat. 519.) The Commissioner of Indian Affairs has reported annually to Congress the use of the money so appropriated, and as a result the appropriations have been continued up to and including the present time. (See footnote, p. 233, *United States* v. *Birdsall*, 233 U. S. 223; also Act of June 5, 1919, 41 Stat. 4, and Act of January 24, 1923, 42 Stat. 1182.)

III.

Contrasts between Indian liquor laws and National Prohibition Act.

The introduction of any intoxicants into Indian country has been attended by such dangerous results that for almost one hundred years no traffic whatever in such liquors, whether for beverage or nonbeverage uses, except upon written order of the War Department, has been allowed. Liquor has been kept away from undeveloped peoples on exactly the same theory that fire is kept away from a powder magazine. But to enforce such absolute prohibition it has been necessary to provide heavy penalties and to build up many administrative powers of enforcement and protection, based upon what might be an arbitrary exercise of police authority in other territory.

The Eighteenth Amendment, which is the basis of the National Prohibition Act, does not forbid nonbeverage use and traffic in nonbeverage liquors. It is not built upon any theory of "wardship" or protection of the public from a dangerous drunken

element; its basis is frankly economic and moral. The National Prohibition Act authorizes the possession of liquor acquired before the adoption of the Amendment, provided the same is stored in the owner's own home and used only therein. It carries but slight punishment for its violation. To substitute it, a timid, new, and only partially interpreted law, for the Indian Statutes, which have resulted from a far different legislative purpose and by usage have become adapted to the peculiar conditions of Indian country, would be to abandon a consistent and orderly governmental procedure for one of doubtful efficacy. No *real inconsistency* between the National Prohibition Act and these Statutes can be urged. Rather may the doctrine of repeal be justified by defendants because of an *alleged* lack of necessity longer to retain the special Indian legislation. It is very possible that, as intoxicating liquor becomes less plentiful because of the increasingly rigorous enforcement of the Eighteenth Amendment and statutes thereunder, the *practical need* for these drastic Indian Statutes will be reduced. Nevertheless, neither the adoption of the Eighteenth Amendment, the passage of the National Prohibition Act and Act Supplemental thereto, nor even their enforcement to a much more satisfactory extent than prevails to-day, can change the fundamentally distinct policy of the Government toward the Indian and the necessity for preserving these separate statutes in order to carry out that policy. They prevent

the proximity of intoxicants to Indians, and are all based upon the theory of preventing the presence of intoxicating liquor within reservations for any purpose. But, should defendants' contention prevail, that no prohibition law except the National Prohibition Act is now applicable to Indian territory, large quantities of liquor might be stored in distilleries and breweries throughout the Indian country. Intoxicants might be transported across it, and, in short, the whole effort of the Federal Government, uniformly maintained for nearly a century, to keep liquor out of the reach of these undeveloped peoples, would be thwarted.

IV.

Other Indian Statutes held undisturbed by general laws.

This court has heretofore stubbornly resisted the repeal of special Indian Statutes by implication based upon general United States laws.

Article 7 of the Chippewa Treaty of 1855, prohibiting the sale of liquors within a specified territory, was held not to be repealed by the admission of the State of Minnesota, embracing such territory, into the Union. (*Johnson* v. *Gearalds*, 234 U. S. 422.)

The provision that the probate laws of Arkansas should apply to Indian territory was held not to repeal the Creek Amendment prescribing certain rules respecting inheritance of property by the Indians. (*Washington* v. *Miller*, 235 U. S. 422, 428.)

The reasoning of the Circuit Court of Appeals for the Ninth Circuit in *Abbate* v. *United States*, 270 Fed. 735, is applicable to this case. Abbate was convicted of violating the Bone Dry Law of Alaska (39 Stat. 903, c. 53, Comp. Stat. 1918, Comp. Stat. Ann. Supp, 1919, pars. 3643b–3643r), which carried very much heavier penalties and was enacted some twenty months prior to the passage of the National Prohibition Act. Basing its opinion upon the statement that the National Prohibition Act was legislation for the whole United States, enacted to carry out the provisions of the Eighteenth Amendment, whereas the Bone Dry Law was passed pursuant to the congressional policy of prohibition in Indian country, first manifested by the legislation of July 27, 1868, when the population of Alaska was largely composed of Indians, the court decided that the National Prohibition Act was "locally inapplicable" to Alaska for the reason that Congress had already provided more severe penalties in a prohibition act "peculiarly applicable" to that Territory. This decision rested upon the reasoning of this Court in *Washington* v. *Miller*, *supra* (p. 428), that:

> Where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal or an absolute incompatibility, that the special is intended to remain in force as an exception to the general.

Only a few months before this cause of action arose Congress expressed an intent to retain these statutes,

as far as the Crow Nation is concerned, until specifically repealed. The Act of June 4, 1920, c. 224, 41 Stat. 751, provides for the allotment of lands of the Crow Tribe. Section 9 thereof is as follows:

> That lands within said reservation, whether allotted, unallotted, or otherwise disposed of, *shall be subject to all laws of the United States prohibiting the introduction of intoxicating liquors into the Indian country* until otherwise provided by Congress. [Italics ours.]

The above section relates to Indian laws whose validity is under attack here. This legislative expression with reference to the Crow Tribe of Indians, considered in connection with the fact, above referred to, that each year Congress has continued to appropriate money to the Bureau of Indian Affairs "for the suppression of the traffic in intoxicating liquors and deleterious drugs * * * among Indians," compels the conclusion that Congress has never ceased to consider statutes relating to the Indian Tribes as special statutes passed for special purposes, fundamentally unchanged by fluctuations of policy and laws relating to the general population of the United States.

V.

Special legislation is not repealed by general law.

The National Prohibition Act is concededly a general statute of the United States. In the absence of specific provisions for repeal, a general statute will

not nullify merely on the theory of repugnancy a prior existing one which is special, local, or particular, or which is limited in its application. (See Sutherland Statutory Construction, 2d Edition (Lewis, 1904), sec. 274, and cases cited thereunder.) It is well settled that a law of a territory will be enforced concurrently with a general law of Congress applicable throughout the United States on the same general subject-matter. (*Moore* v. *People*, 14 Howard 13.) In *Washington* v. *Miller*, *supra*, this court had under consideration the question of whether a subsequently enacted general statute repealed special provisions of a prior act confining the descent and distribution of Creek land to citizens of the Creek Nation. On pages 427 and 428, after setting forth the subsequently enacted statute, this court observes:

> No repealing clause accompanied this provision, so the question is, did it repeal the provisos by implication. There is no doubt that, if taken literally, it would subject the Creek lands to the Arkansas law of descent and distribution without any qualification or restriction. But this would be only by reason of the generality of its terms, for it made no mention of that law or of those lands. In short, it was plainly a general statute and did not show that the attention of Congress was then particularly directed to the descent of the lands of the Creeks. * * * In these circumstances we think there was no implied repeal, and for these reasons: First, *such*

> *repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably can not be given to both* (*United States* v. *Healey*, 160 U. S. 136, 146; *United States* v. *Greathouse*, 166 U. S. 601, 605); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (*Townsend* v. *Little*, 109 U. S. 504, 512; *Ex parte Crow Dog*, *Id.* 556, 570; *Rodgers* v. *United States*, 185 U. S. 83, 87–89); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized. [Italics ours.]

Certainly as between the later enacted general statute, the National Prohibition Act, and the prior existing special Indian statutes, no irreconcilable conflict or incompatibility can be found. Indeed, the only variation defendants are able to show is that the Indian statutes carry heavier penalties. But palpably those heavier penalties have been inserted to protect both the Indians and the surrounding white settlers from unusual conditions resulting from violation of such statutes. The Indian needs the same degree of protection from access to intoxicating liquors and the communities near to his reservations

need the same degree of protection from intoxicated Indians as they did before the passage of the National Prohibition Act.

Counsel for plaintiffs in error have emphasized the general subject of repeal by implication and the analysis of prominent cases *not involving Indian Statutes*. They lose sight of the fact that the particular laws they seek to remove from the statute books were enacted for a specific purpose and are part of a Code of Federal Procedure regulative of the Indian country and expressing a well-defined and established governmental policy toward these American wards.

VI.

The question certified has already been decided in the Eighth Circuit.

In the case of *McClintic* v. *United States*, 283 Fed. 781, the Circuit Court of Appeals had before it the exact question certified in this case. McClintic was convicted on a charge in an indictment of unlawfully possessing corn whisky in Indian country, to wit, in Osage County, Oklahoma. The indictment was based on the Act of July 23, 1892, as amended by the Act of July 30, 1897. He prosecuted his appeal on two assigned errors—one, that the National Prohibition Act repealed the Act of July 23, 1892, as amended; and two, that the trial court erred in admitting certain evidence. The court dismissed the second contention as "wholly without merit" and decided the question of whether the National

Prohibition Act had repealed the prior existing Indian statute in the negative, saying, pages 782–783:

> The Act of July 23, 1892, is a special act passed for a special purpose, covering certain localities, and all of the amendments to it were made prior to the passage of the general Act of October 28, 1919; and the question presented to us is, whether the later Act, passed for an entirely different purpose, repealed the earlier. It does not expressly do so. Its only expression in that regard is this: "All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency" (Sec. 35, Title 2), which gives no support to the first contention. *Great Northern Ry. Co.* v. *U. S.*, 155 Fed. 945, 947, 84 C. C. A. 93. Then if there be repeal it must be by implication, which, it is well understood, is a rule not favored.
>
> Another cogent reason for rejecting the first contention, is this: "The rule of statutory construction is well settled that a general act is not to be construed as applying to cases covered by a prior special act upon the same subject. On this principle we held in *Townsend* v. *Little*, 109 U. S. 504, that special and general statutory provisions may subsist together, the former qualifying the latter." *U. S.* v. *Nix*, 189 U. S. 199, 205.

CONCLUSION.

Section 35, Title II, of the National Prohibition Act, provides that only such portions of prior existing prohibition statutes as are inconsistent with the National Prohibition Act are repealed. There is nothing inconsistent between the purposes of the Indian Statutes and the National Prohibition Act. A heavier penalty for the violation of the one can not be deemed inconsistent, particularly when its clear purpose is to prevent commingling of two elements long regarded as dangerous when united—intoxicating liquor and the American Indian.

Although since the passage of the Eighteenth Amendment it is a crime for any resident of the United States to possess, transport, or sell intoxicating liquor, nevertheless it is not only a crime, but repugnant to a long-established public policy, and socially dangerous as well, to traffic in ardent spirits among primitive peoples for whose welfare, protection, and development the United States Government is responsible as guardian.

Even if not compelled to recognize the continued applicability of both statutes within their respective fields of operation by the purpose and intent of Congress which underlies each, still the National Prohibition Act as a general law can not be deemed to repeal the Indian Statutes, which are special and restricted to a comparatively narrow field of operation.

Finally, the Circuit Court of Appeals has answered its own question in the instant case by its definite and sound opinion in the *McClintic case, supra.*

For the foregoing reasons it is respectfully submitted that the question certified should be answered in the negative.

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Special Assistant to the Attorney General.

MARCH, 1924.

APPENDIX.

The Act of July 23, 1892, c. 234, 27 Stat. 260, is Section 2139 of the Revised Statutes, amended and reenacted as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section twenty-one hundred and thirty-nine of the Revised Statutes be amended and reenacted so as to read as follows:
>
> "SEC. 2139. No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian Superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the Indian country shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. All complaints for the arrest of any person or persons made for violation of any of the provisions of

this act shall be made in the county where the offense shall have been committed, or if committed upon or within any reservation not included in any county, then in any county adjoining such reservation, and, if in the Indian Territory, before the United States court commissioner, or commissioner of the circuit court of the United States residing nearest the place where the offense was committed, who is not for any reason disqualified; but in all cases such arrests shall be made before any United States court commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the State in which such reservation is located to issue warrants for the arrest and examination of offenders by section ten hundred and fourteen of the Revised Statutes of the United States. And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense."

The Act of January 30, 1897, c. 109, 29 Stat. 506, and amendatory of section 2139, Revised Statutes (Act of July 23, 1892), is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Gov-

ernment under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: *Provided, however*, That the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department.

SEC. 2. That so much of the Act of the twenty-third day of July, eighteen hundred and ninety-two, as is inconsistent with the provisions of this Act is hereby repealed.

The portion of the Act of May 25, 1918, c. 86, 40 Stat. 561, 563, relative to the possession of intoxicating liquor in the Indian country reads as follows:

SUPPRESSING LIQUOR TRAFFIC:

For the suppression of the traffic in intoxicating liquors among Indians, $150,000: *Provided*, That on and after September first,

> nineteen hundred and eighteen, possession by a person of intoxicating liquors in the Indian country where the introduction is or was prohibited by treaty or Federal statute shall be an offense and punished in accordance with the provisions of the Acts of July twenty-third, eighteen hundred and ninety-two (Twenty-seventh Statutes at Large, page two hundred and sixty), and January thirtieth, eighteen hundred and ninety-seven (Twenty-ninth Statutes at Large, page five hundred and six).

The portions of the National Prohibition Act, c. 85, 41 Stat. 305 (Title II, Sections 3, 25, 29, 33 and 35), alleged to affect the Indian statutes relating to intoxicating liquor, are as follows:

Title II, Section 3:

> No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: *Provided*, That nothing in this Act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts.

Title II, Section 25:

> It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

Title II, Section 29:

> Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than

$200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this Act against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.

Title II, Section 33:

After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when

the Eighteenth Amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used.

Title II, Section 35:

All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

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NO. 222.

IN THE

United States Supreme Court

OCTOBER TERM, 1923.

A. P. KENNEDY and JOHN KENNEDY,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

KANSAS CITY LAW BRIEF PRINTING CO.,
KANSAS CITY, MO.

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(II) Even if the prior acts were special of local (which we deny), they would still be repealed by the National Prohibition Act, or at least modified as to the penalties, since the latter Act was passed to carry into effect the mandatory provisions of the Eighteenth Amendment to the Constitution, and is in irreconcilable conflict with the former Act 18

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NO. 222.

STATEMENT.

We feel it incumbent to file a reply to the able Brief submitted on behalf of the Government. The case is one surcharged with the application of one of the most important principles of law, and there lies a background, which unfortunately cannot be presented and made known to the Court, making it of the deepest and most unusual interest and consequence to the Plaintiffs in Error.

As expected, the Government is relying solely on the theory and contention that the Acts of Congress involved, enacted prior to the adoption of the Eighteenth Amendment, and passage of the National Prohibition Act, are special or local laws, which is the only refuge afforded, tacitly conceding that, if the Acts be general, and not special or local, then the question certified must be answered by this Court in the affirmative, and the Acts be held to have been repealed.

We have no quarrel with any of the cases cited by learned counsel for the Government, nor the principles therein enunciated, nor the results reached, with the exception of one case, decided by a lower court, and not binding on this Court. Cases are cited establishing the power and duty of Congress to deal with the Indians, (all of which is cheerfully conceded), but, with the exception referred to, none has been called to the attention of the Court, showing that these Acts are special in their nature, nor in any way contravening the cases heretofore cited by us, always recognizing and treating such Acts of Congress as general.

In passing the Acts in question, Congress affected and subjected all the territory and all of the persons subject to its legislative jurisdiction over the subject-matter covered. When that is done, every element and requirement making a law general is present. Otherwise, and if the contention of the Government be sustained, it would seem impossible for Congress to enact a general law, but every statute passed would necessarily be special or general. Most of the Acts

of Congress inherently cannot reach or affect all the territory, or the people embraced therein, and the people for which Congress can legislate, and, under the contention of the Government, in such cases, any act of Congress, however general in its terms and nature, and however completely covering the territory and people that could be reached, would be special or local, never to be affected by another general or special act, however repugnant to, and inconsistent with, such act, a later general act might be, unless there be a particular clause repealing the former act. For instance, a law affecting the ports, the Army, the Navy, and offenses and crimes against the Government, would be special or local, and would not be repealed or modified, unless Congress should specifically point out the particular act, and declare that it was repealed. Under the remarkable contention now made, however inconsistent with, and repugnant to, any former act of Congress, and however much the intent might appear to repeal the same, by every inference, if Congress through its ignorance of, or inattention to, the former law, had not specifically repealed it, such law would remain untouched. The statement of the situation demonstrates the absurdity of the contention.

BRIEF AND ARGUMENT.

I.

The able Brief for the Government seeks to support a negative answer to the question certified solely on the theory and contention that the Acts of Congress prior to the adoption of the Eighteenth Amendment, and the enactment of the National Prohibition Act, are special or local acts, but adduces no binding authorities so supporting, or contravening the direct and positive ones cited in the Brief for Plaintiffs in Error, and the Acts involved must be held to be general laws.

Learned counsel seem to overlook the essential elements of general and special laws. It would seem that the underlying theory is, that, because the three Acts enacted prior to the Eighteenth Amendment, and the National Prohibition Act, comprehended all the various Indian Countries, (there being many such places), and all the persons possessing intoxicating liquors therein, coupled with the fundamental power and purpose of Congress to give benefit and protection to the Indians, it necessarily follows that they are special as to the numerous spots affected. If such a contention be sustained, it would be impossible for Con-

gress, in such instances, to pass a general law. There is, and can be, no contention that any of the statutes applies only to one particular Indian Country, or to any one particular class, Tribe or Nation of Indians, but each embraces all of the classes of Indians, and covers every inch of territory, over whom and which Congress could exercise jurisdiction in passing the Acts. This meets every consideration of a general law. Such an Act of Congress cannot be turned into a special or local law, merely because the power of Congress is limited to and affects merely a certain class, or particular classes, and a limited territory, and had a special purpose in passing the legislation, when all the persons are comprehended, and all the territory is embraced, over whom and which Congress had jurisdiction.

In the sense in which the Government is now urging, practically every act of Congress is special; for, if the purpose and power of Congress can render an act special, then every act of Congress is based upon one or more of the many powers given by the Constitution, and has a special purpose, in that it necessarily has a single or limited number of subject-matters, and inherently special in that sense. In such a sense, every Revenue, Tariff, Interstate, and similar acts, would be special, and not general, and Congress could never affect one act by another, even though based upon the same powers and purposes as the former act, unless Congress should specifically repeal the former act.

This contention leads us to call the Court's attention to the general definitions, supported by an array of cases too numerous to cite, in connection with those heretofore cited by us in our First Brief. The statements, however, of the leading text-books are supported by such full and rich citations from all the jurisdictions, we do not feel called upon to use very many of the supporting cases. They clearly demonstrate the absurdity that these Acts are special. We desire, therefore, to call the Court's attention to the following authorities, in connection with Point II of our Brief in Chief, beginning on page 26.

In 26 **Cyc.** 987, it is said:

> The distinction between general and special and private and public laws depends on all the circumstances, having regard to the effect rather the form of the statute. A public or general law is one operating uniformly as distinguished from a special or local act, which does not so operate, but **relates to a particular locality or a part of a class.**

In 26 **Amer. and Eng. Encyc. Law** (2nd Ed.) 523, after having stated and supported by authority that the terms "public" and "general" are synonomous as to subject-matter, with reference to the use of the term "general," it is said:

> As already stated, the term "general" is synonomous with a "public," and opposed to "private," when reference is had to the subject-matter of

the statutes. When, however, regard is had to the extent of the territory over which the statute operates, the term is opposed to "local" and describes a statute **operative throughout the legislative jurisdiction**, and not confined to a **particular locality.** It is also used as contradistinguished from "special" and then it means relating to **all of a class** instead of to **one or more** of a **part of** that **class.**

On the same page, of the same Work, with reference to the elements of a local law, it is also said:

The term "local" as applied to statutes is of modern origin, and is used to designate an act which operates only within a city, county, or other **particular division or place,** and not throughout the **entire legislative jurisdiction.** In this sense, the term "local" is the antithesis of "general."

In **Ruling Case Law,** Sec. 65, Page 814, a general law is thus defined:

The commonly accepted definition of a general law, as distinguished from a special or local law, is that it is a law that embraces a class of subjects or places, and **does not omit any subject or place naturally belonging to such class.**

In the same Work, Sec. 66, Page 815, it is said:

Laws are **general** and uniform, not because they operate on every person in the State, for they

do not, but **because they operate on every person who is brought within the relations and circumstances provided for.**

In **Railroad Co. v. Cutts,** 4 Otto 155, 24 L. Ed. 94, adopting the definition as given by the Supreme Court of Iowa, in defining a general statute, this Court has aligned itself with all the preceding authorities, saying:

> The Supreme Court of the State, in the case of McAunich v. R. R. Co., in speaking of legislation as to classes, said: "These laws are **general** and uniform, not because they operate upon every person in the State, for they do not, but **because every person who is brought within the relation and circumstances provided for is affected by the law.** They are **general** and uniform in their operation upon all persons in like situation, and **the fact of their being general** and uniform **is not affected by the number of persons within the scope of their operation."**

In the case of **People v. Kewanee Light and Power Co.,** 262 Ill. 255, 104 N. E. Rep. 680, the rule, where based upon locality, is well stated, where it is said:

> It is not necessary that a law, to be general, should apply to every person in the State. Very few laws do so apply, but **an act which is general in its nature and uniform in its operation upon all persons coming within its scope is a general law.**

* * * A law is general, not because it embraces all the governed, but **because it embraces all who are similarly situated and who come within its provisions.**

In **Holt v. Birmingham**, 111 Ala. 369, 19 So. Rep. 735, the Court said:

> Any statute which affects the public at large, **though operating within the limits of a particular locality,** is generally declared to be a public statute.

In **Title and Document Restoration Co. v. Kerrigan**, 150 Cal. 289, 88 Pac. Rep. 356, the Court said:

> This Court has had occasion many times to consider what are special laws. "It is not necessary that a law shall affect all the people of a State in order that it may be general, or that a statute concerning procedure shall be applicable to every action that can be brought in the courts of the State. A statute which affects all the individuals of a class is a general law, while one which relates to particular persons or things or a class is special." McDonald v. Conniff, 99 Cal. 386, 74 Pac. 71. * * * The law in this regard was well stated by this Court, through Mr. Justice Harrison, in People v. Central Pacific R. R., 105 Cal. 576, 584, 38 Pac. 905, 906, where it is said: "A law which operates only upon a class of individuals is none the less a general law, if the individuals

> to whom it is applicable constitute a class **which requires legislation peculiar to itself in the matter covered by the law."**

We might multiply these cases, of like import, almost without number, but we do not deem it necessary. We must start with the postulate that the Acts of Congress, enacted prior to the adoption of the Eighteenth Amendment, and the passage of the National Prohibition Act, are general in their nature, and neither special nor local, and that the rule of repeal by implication must be based upon this character of the statutes involved. Section 33, Title II, of that Act, does specifically repeal "all provisions of law that are inconsistent" therewith, and this necessarily applies to any general act, or any special act. There can be no question but that it does apply to any general act, and, under the authorities, which we have adduced in this and our former Brief, there can be no other conclusion than that the former Acts, prescribing severer and different penalties for the offense charged, are necessarily repealed.

Counsel for the Government state their contention, upon which they seek a negative answer to the question propounded, on page 6 of their Brief, where they thus characterize the Act of Congress involved:

> They are special statutes enacted for a special purpose, and apply but to a restricted territory and to a particular class of people.

Counsel cite, in support of this declaration, the following cases:

United States v. Kagama, 118 U. S. 375;
United States v. Wright, 229 U. S. 226;
United States v. Sandoval, 231 U. S. 28.

The case of **United States v. Wright,** 229 U. S. 226, 57 L. Ed. 1160, is perhaps one of the clearest cases applicable, and that does not sustain the contentions of the Government. It involved largely the enabling Act of June 16th, 1906, admitting the State of Oklahoma into the Union, and as to whether or not the Acts of 1892 and 1897 were repealed by the Enabling Act as to the introduction of intoxicating liquors from other States. No such situation was presented as in the case at bar, where Congress was enacting legislation in pursuance of a newly adopted Constitutional Amendment. This Court recognizes our contention, and would allow the former Acts to stand, only so far as they were not inconsistent with the Enabling Act.

This Court significantly said:

> It seems to us, upon the whole, that during this transition period preceding the admission of Oklahoma as a State, the several acts referred to were intended to and did stand together, **excepting so far** (if at all) **as they were necessarily repugnant one to the other:** that is to say, the Act of 1892 as amended in 1897, on the one hand making "Indian Country" * * * the test of the prohibition respecting the introduction of intoxi-

cants; and the act of 1895, on the other hand, employing the territorial test, irrespective of whether it was or continued to be Indian Country.

It will be seen, therefore, that there did not exist any repugnancy of inconsistency, as in the case at bar. This Court plainly stated that, if there was such, then as to the repugnancy and inconsistency, there would have to result a repeal. It treated the Acts of Congress as general, and applied the usual rule, where there was not a specific repeal, but one by implication, if any, and if, as to the subject-matter under consideration by this Court at that time, there had been such repugnancy as and inconsistency as in the case at bar, no question could arise as to the position this Court would have taken.

However, the preceding case, as well as the later ones relied upon by the Government, consider and are largely determined by the decision of this Court in the case of **Ex Parte Webb,** 225 U. S. 663, 56 L. Ed. 1248, in which this Court held that the scope of any repeal of the prohibitions of the Act of March 1, 1895, specifically enacted against the bringing of intoxicating liquors in the Indian Territory, were limited to the extent the two acts covered the same field, thus leaving in force so much of the prohibitions of the earlier acts as to relate to the carriage of such liquors without the State of Oklahoma into that part which was the Indian Country, but clearly sustaining our contention that the inconsistent and irreconcilable parts could not

stand, and that those of the earlier Acts, inconsistent with the later Act, must yield. This Court also, in this decision, clearly recognizes and treats the Act involved as general laws, and applies the principles governing the same.

In deciding that Case, this Court said:

> Since the Government concedes that the Act of 1895 has been repealed, **saving so far as it prohibited the carrying of intoxicating liquors, etc., from another State into the Territory,** the matter discussed is still further narrowed.
>
> Before passing, however, it should be noted that § 2139, Rev. Stat., and the Act of 1897, contain prohibitions respecting the sale of intoxicating liquors to Indians, and in this, and in other important respects, cover grounds not covered by the Act of 1895. We must not be understood as deciding that these prohibitions are no longer in force within what was the Indian Territory, either because of the assumed effect of the Act of 1895 in superseding **the previous general statute of which the Act of 1897 was amendatory,** or because of the Oklahoma Enabling Act and the admission of the State thereunder.

The Court will note that there is no intimation whatever that the Acts of 1892 and 1897 were special statutes or laws, but, in this case, they are treated as general laws, and the rule as to repeal by implication applied, and so far as repugnant to, and inconsistent

with, the later Act, are considered as repealed. This Case, and the preceding Case, are, therefore, strong authorities for our position, and they determine the instant case in favor of the Plaintiffs in Error. In none of these cases has this Court ever waivered in declaring the repeal of an earlier Act of Congress by a later, when there exists the clear and patent repugnancy there is in the case at bar.

The case of **United States v. Sandoval**, 231 U. S. 28, 58 L. Ed. 107, does not militate against our position, when considered in the light of the facts in the case. It is another case in which chiefly there was considered the effect of an enabling, in which there was a provision that the State should provide in its organic law for the permanent prohibition of the sale, barter or giving of intoxicating liquors to Indians, and of the introduction thereof "into Indian Country," which term should also include all lands "owned or occupied by the Pueblo Indians of New Mexico." There was also another significant provision in the Enabling Act to the effect, that, after allotment of lands within the Indian Reservations, for twenty-five years thereafter, such lands should be subject "to all the laws of the United States prohibiting the introduction of liquor into the Indian Country, and the terms "Indian" and "Indian Country" shall include the Pueblo Indians, and the lands now owned or occupied by them." With such a background, no other result could have been reached by this Court, but there is not any intimation that the Statutes then under consideration, and now involved, were special, and not general.

The case of **Joplin Mercantile Co. v. United States,** 236 U. S. 531, in no way contravenes the direct and positive authorities, which we have cited in support of our contentions. There were involved in that Case the Acts of 1892, 1897, and the Act of March 1, 1895, applying specifically to the Indian Territory, and the Enabling Act admitting the State of Oklahoma. The Enabling Act required the incorporation in the State Constitution of strong prohibitory provisions as to intoxicating liquors in those parts of the proposed State known as the Indian Territory and the Osage Reservation and other Indian Reservations as of January 1st, 1906, to continue for a period of twenty-one years from the date of admission. Section 21 of the Act also provides that "the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States."

The First Section of the Enabling Act contained the following proviso:

> Provided, That nothing contained in said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as said rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any laws of regulation respecting such Indians, their lands, their property, or other rights, by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.

There was, therefore, a plain reservation of the Acts of Congress now under consideration, and a clear intent expressed not to repeal them. This Court did, however, modify the Act of 1895, which would have otherwise been in effect, respecting intrastate transactions, so as to suspend that Act, thus, in effect, repealing it.

When all the cases cited by counsel for the Government are considered with reference to the facts of the particular cases, it readily appears that in none of them have such acts as those of 1892, 1897 and 1918 been declared special. Insofar as this Court has expressed itself, and where the question has come directly in issue, as we have shown by cases heretofore cited, these statutes have been treated as general, and not special. The cases on which the Government is relying unquestionably show the power of Congress to legislate with reference to the Indians, Indian Country, and some of them show a purpose to protect the Indian, but none have treated the legislation now under consideration as being special. Neither the purpose of Congress to protect the Indians, nor the fact that its legislation is necessarily limited to all the Indians, and to all the Indian Country, will make an act covering either the subject matter of persons or territory a special or local act, so long as the statutes apply to all Indians and to all Indian Country, and affect all persons and all places subject to the legislative jurisdiction of Congress. Such is true as to the acts now involved, and there is no escape from the proposition that the Acts of 1892, 1897 and 1918 are general and not special, and that wherever a repeal by implication

would exist as between an earlier and a later general act, it must likewise be applied in the case at bar. The Government tacitly concedes that, if these prior acts of Congress are general laws, then they were repealed by the National Prohibition Act, and the indictment and conviction in this case must fall.

Prior to the Eighteenth Amendment, Congress had no power to pass prohibitory legislation as to the States, and in passing the Acts of 1892, 1897 and 1918, it necessarily exercised its power as given it by the Constitution over the Indians and their lands. Congress did, however, in these acts, cover its entire legislative jurisdiction, and necessarily the laws must be general, although as to territory limited to the Indian Country, and as to persons, those who were brought within the circumstances growing out of the Indians and their Country. When the Eighteenth Amendment was passed, however, the power of Congress was extended to all the United States and all territory subject to the jurisdiction thereof, and was authorized by the amendment to enforce it by appropriate legislation. The Acts of Congress, however, passed when its jurisdiction was limited, was none the less general, because Congress covered its entire legislative jurisdiction. The Eighteenth Amendment was extended to the Indian, and its effect was to place the Indian and the white man, and all other citizens on exactly the same plane, and all necessity for legislating directly with reference to the Indians was removed by this amendment. Unquestionably, therefore, we have two general laws in which the last expression of Congress is in irreconcilable conflict with the Acts, and a repeal of the prior acts inevitably follows.

II.

Even if the Prior Acts were special or local (which we deny), they would still be repealed by the National Prohibition Act, or at least modified, as to the penalties, since the latter Act was passed to carry into effect the mandatory provisions of the Eighteenth Amendment to the Constitution, and is in irreconcilable conflict with the former Acts.

Counsel undertake to establish the doctrine, without limitation, that special legislation is not repealed by a general law, ignoring the exceptions that exist in applying the law of repeal by implication. Under such a contention, no special law could be repealed by a general law, which is not the fact.

The rule invoked is not one of positive law, but one of construction only. It is rather one of presumption that the Legislature does not intend to repeal the special law, provided the circumstances do not show such intent. It is equally the rule that such presumption must give way to a plain manifestation of a different legislative intent.

While it seems to us that there can be no shadow of doubt that the Acts of Congress involved are general laws, yet we earnestly contend that, even if they should be treated as special laws, they must be held as repealed or modified as to the penalties, because they fall under that branch of the rule, which dissolves the usual presumption indulged in applying the rule of construction.

It is always true that where a general act and a special act are necessarily inconsistent, or when the

two acts are so irreconcilably inconsistent or repugnant that both cannot stand together, or where the intent of the Legislature is to establish a uniform system throughout the legislative jurisdiction, or where an Act is passed to carry into effect the general mandatory provision of the Constitution, all acts, or parts thereof, inconsistent with such general law are repealed, whether special or general.

In **36 Cyc. 1086,** it is said:

> The purpose to abrogate the particular enactment by a general one is sufficiently manifested when the two Acts are so irreconcilably inconsistent or repugnant that both cannot stand together.

In the same work, on page 1090, it is said:

> Where the clear general intent of the Legislature is to establish a uniform system throughout the State, the presumption must be that local acts are intended to be repealed. So, also, where an act is passed to carry into effect a general mandatory provision of the Constitution, all acts inconsistent therewith, **although local,** are repealed.

In **26 Am. and Eng. Encyc. of Law, (2nd Ed.) 742,** after having stated the presumption, it is said:

> But where the later general act is necessarily inconsistent with the prior special act, or with the special provisions of an earlier act, the Legislature must be deemed to have intended to repeal the special law.

These statements of the principle are supported by such Citations of Authority, and we shall not present but a few of them in supporting the principles in this connection.

Unquestionably, the rule that a general statute, putting into effect the mandate of a constitutional provision, repeals special as well as general acts governs in the case at bar. The Eighteenth Amendment extends not only to the States composing the Union and citizens thereof, but also to all territory and peoples subject to the legislative jurisdiction of Congress. The amendment also specifically directs Congress to provide for its enforcement by appropriate legislation. The National Prohibition Act was passed in pursuance of that mandate, and this case is governed by this principle, and any presumption that would obtain as to the intent of Congress is dissolved.

In **Commonwealth v. Brown,** 210 Pa. St. 29, 59 Atl. 479, there existed local acts at the time a constiutional provision of the State came into being with a mandate to the Legislature, as in the case at bar, to carry the constitutional provision into effect. The First Syllabus holds as follows:

> Where an act is passed to carry into effect a general mandatory provision of the Constitution, **all acts inconsistent therewith, though local, are repealed.**

The Court well stated the rule in its various phases as to repeals of special laws by general laws, saying:

The result of the cases may be summed up as follows:

First: The rule that a general statute does not repeal by implication a local act with different or inconsistent provisions is still the prevailing rule.

Secondly. But the rule, being founded on a presumption of legislative intent, will not apply when a contrary intent is clearly apparent.

Thirdly. Where the clear general intent of the Legislature is to establish a uniform and mandatory system as in the municipal classification acts, the presumption must be that the local acts are intended to be repealed.

Fourthly. Where an act is passed to carry into effect a mandatory general provision of the Constitution, the presumption must be that it was intended **to repeal even local acts inconsistent with its terms.**

In **McCleary v. Allegheny County,** 163 Pa. St. 578, 30 Atl. 120, the Court applied the same principle. After showing the repugnancy of the earlier local or special law with the later law made in pursuance of the constitutional provision, the Court said:

> They cannot stand together. The general act being in complete harmony with the constitution, and clearly passed to carry it into effect, **the local act,** as respects the sheriff, **must give way to the general act.**

In **Union Pacific Ry. Co. v. Ryan,** 113 U. S. 516, 28 L. Ed. 1099, the charter of the city of Cheyenne contained provisions with reference to the assessment of railroad property, and was, therefore, a special or local law. The Territory, however, passed a general act which was in conflict with the provisions of the special act or charter of the City. It was strenuously contended that there could be no repeal by this general act, but this Court denied the contention and sustained the repeal. This Court said:

> They contend that the language of the city charter is very broad, authorizing the corporation to assess every kind of taxable property situated within the city bounds; and that this includes railroad property; and they insist that this law must stand until it can be shown to be repealed; that the railroad assessment law does not repeal it in express terms; and cannot be construed to repeal it by implication, because the city charter is a special law, intended for a particular locality, and will not be repealed by implication by any general law containing contrary provisions, unless the latter be expressed in such universal terms as necessarily to include every particular case; that such universal terms are not used in the law; but on the contrary, whilst other subordinate territorial divisions are included by name, corporate cities and municipalities are not mentioned nor alluded to. This is a summary of the defendant's argument. It is certainly plausible and entitled to careful consideration.

First. As to the relative character of the two statutes; is it true that the one is a special statute, and the other a general one, in the sense contended for? The city charter is special as it relates to a single district or municipality; but the Railroad Assessment Act is quite as special as relating to a single subject of taxation. The one gives general powers of assesment and taxation to the city; but the other directs that railroad property shall be assessed and valued by the Board of Equalization in a particular way. Is not the last law even more special in character than the first? Suppose a law had been passed declaring that every horse in the Territory should be assessed for the purpose of taxation at the value of $2.00. Would not such a particular direction be binding on the City of Cheyenne as well as on the country district? Do not the object and reason of the Railroad Assessment Law apply to a city like Cheyenne, as well as to counties and townships? Ought not the policy of the State with regard to special objects of taxation to be extended to every portion of the State, unless some defect in the laws themselves prevent its being done?

Indeed, so far as effecting a repeal under the preceding authority, it would seem that if the Acts of Congress applying to Indian Country are to be considered special, then the National Prohibition Act is to be considered even more special as effecting a repeal. See also **Louisville Water Company v. Clark,** 143 U. S. 1, 36 L. ed. 55.

In **Howard v. Hulbert**, 63 Kan. 793, 66 Pac. 1041, in holding that a general statute repealed a special one, the Court said:

> We do not overlook the rule that repeals by implication are not favored, but we are equally aware of the rule "that where any two statutes are in any respect, in both language and meaning, irreconcilably repugnant, the provisions of the statute last enacted repeal those of the former with which they conflict." Elliott v. Lochnane, 1 Kan. 125. And we hold that this rule **applies as well between a general and special act as between two general ones.**

In **People v. McCann**, 247 Ill. 30, 93 N. E. 101, the Court said:

> In **People v. Town of Thornton,** 186 Ill. 162, 174, 57 N. E. 841, 845, it was said: "It is also a well-settled principle that, where two statutes are clearly repugnant to each other, the one last enacted operates as a repeal of the former; and this principle is applicable **even though the prior statute is a local or special act** which is repugnant to a subsequent act. * * * * There is no rule which prohibits the repeal of a special act by a general one, and the question is always one of intention." Numerous decisions of this court and other authorities will be found cited in the opinion in that case which sustain the rule announced.

We submit, therefore, that in any view of the case the Acts of 1892, 1897 and 1918 must be held to have been repealed, at least to the extent of the penalties imposed for the possession of intoxicating liquors in Indian Country. This is true, whether they be held to be general or special.

III.

Counsel cite other Indian Statutes, and cases, which they claim, show that this Court has resisted the repeal of such Special Indian Statutes. These cases, when analyzed, will show that they were really special Acts, and not general, as were those of 1892, 1897 and 1918.

The case of **Johnson v. Gearalds**, 234 U. S. 422, involved a treaty with the Chippewas, and was, therefore, special as to them, and was not a treaty with all the Indians, and did not affect all the Indians and all Indian territory, as did the Acts now involved.

Washington v. Miller, 235 U. S. 422, the Act of Congress was one applying solely to the Creek Indians, and no irreconciable conflict existed as in the ones now under consideration. This may well be treated as a special law, inasmuch as it applied to but one class of Indians, while the Acts now being interpreted were general and applies to all Indians and all Indian Country. This Court, however, did plainly recognize the rule that there would be a repeal,

"where there are two statutes upon the same subject," and "where there is such an irreconcilable conflict between an earlier and a later statute **that effect cannot reasonably be given to both.**"

In **Abbate v. United States**, 270 Fed. Rep. 735, a like situation is found, where the Act involved related exclusively to the Territory of Alaska, and is brought under the definition of a special law. While we believe the decision as shown by the majority opinion is wrong, yet, if it be held to be right, under the principles applied, it is not an authority here, because it applied exclusively to that Territory. If it had applied generally to all Territories, then it would have been a general law.

However, there is in this case a strong dissent by Circuit Judge Ross, and his opinion really reflects the law that ought to have been applied.

Counsel, in this connection, called the Court's attention to the fact that by the Act of June 4, 1920, providing for the allotment of lands to the Crow Tribe of Indians, the laws of the United States prohibiting the introduction of Intoxicating liquors into Indian Country is made applicable thereto until otherwise provided by Congress. This is cited to show that Congress still has in mind the Indian Country and seeks to apply those laws specifically to the Crow Indians.

When we carefully consider this Act of Congress, however, it really bears out our own contentions. If the Government is right in its strenuous insistence

that these laws have never been repealed as to Indian Country, it would hardly seem necessary for Congress to make such a sweeping provision as it did. Congress must have had at least a doubt as to whether these statutes would apply to Indian Country without legislation, and if it had been merely the purpose of Congress to extend the laws to the land of these Indians, and if Congress had been free from any doubt as to the contention now made by the Government, it would really have been unnecessary for it to have applied the laws in accordance with the definition of Indian Country as it now stands, and would doubtless have extended them by an appropriate reference to the statutes as they existed prior to the National Prohibition Amendment. On its last analysis, therefore, it shows at least a doubt in the mind of Congress as to whether those statutes would apply at all, and we are justified in really assuming that Congress enacted the statute because of the fact that those statutes would not apply before or after allotment.

Congress did exactly in this case as it did in an act construed by this Court in **United States v. Stafoff**, 260 U. S. 477, 67 L. ed. 358, where, after the decision of this Court in **United States v. Yugonivich**, 256 U. S. 450, it re-enacted all prior laws in regard to the manufacture and tax of, and traffic of intoxicating liquors and all penalties for violation thereof, except such as were directly in conflict with any provision of the National Prohibition Act. Even after its enactment this Court held that all offenses prior thereto would be governed by the National Pro-

hibition Act, and that only such as were subsequent to the passage of the act re-enacting the former laws could be punishable thereunder. This Act also provided, which the National Prohibition Act does not, that a conviction for an offense under one act should be a bar to a prosecution under another. This is the course which Congress will have to pursue in order to make again applicable those prior acts, at least so far as their penalties are concerned, governing the offense of having intoxicating liquors in possession.

The legislation noted, therefore, does not, when closely analyzed, lend any support to the contention of the Government.

IV.

It is true that in the case of **McClintic v. United States,** 283 Fed. 781, the Circuit Court of Appeals did decide the question involved in this case. With our profound respect for that Court, and for the learned Judges sitting at the time of the hearing, we still believe it was wrong in its decision. The Court then sitting was composed of Circuit Judges Lewis and Kenyon and District Judge Johnson. Very shortly, however, after that decision, this case was reached and argued before Circuit Judges Sanborn and Kenyon, and District Judge Pollock, Judge Kenyon sitting in both cases. Upon the argument of this case and the presentation of the law involved, that sace Court voluntarily certified the question now propounded to this Court. We do not know how fully the former case was presented, but the fact of this

certification indicates an unwillingness of that Court to follow its former decision, and the certification itself is an authority for our contentions.

The cases upon which the decision was rested certainly ought not to make an authority a controlling authority here. We shall not discuss all of them, but shall refer to some as showing the character of cases relied upon.

The Court, in support of its position that the acts are special, cites the case of **Great Northern Ry. Co. v. United States,** 155 Fed. 945. The acts involved are what is known as the Elkins and Hepburn Act. Two more general acts could not exist, and the Court nowhere intimates that either the one or the other is special, but did hold that where a conflict existed, that as to such conflict there was an appeal. The earlier act was directed against those which were done either knowingly or not knowlingly, and the later act limited the offenses which were done knowingly.

Referring to acts not knowingly done, the Court said, on page 958:

> But insofar as the original section embraces such acts when not knowingly done, it is undoubtedly repealed.

The Court cites, in support of the rule it applies, **United States v. Nix,** 189 U. S. 199, 47 L. ed. 775. This case, however, is far from reaching that or the instant case as an authority. It involved an earlier

statute which was passed specifically with reference to marshals of the Territory of Oklahoma, and it was claimed that it was repealed by merely a rider or general provision of a sundry appropriation bill which referred and applied generally to United States marshals. It clearly appears, therefore, that the act sought to be repealed was really a special act, and it was attempted to repeal it by a very general act, and the rule was properly applied in that case. We call attention to this case, therefore, as the leading and typical authority upon which the Court rested its decision in the McClintic case. It is no matter of wonderment, therefore, that upon the presentation of the case at bar, so shortly following this decision, that same Court was so impressed with the strength of the contentions in the present case that it sought the advice of this Court. We believe it will be found, upon examination of the other cases cited by the Court, the opinion was not well founded.

In view of the fact that the lower courts have not agreed upon the question now presented, we shall not undertake to thread through all the decisions of those courts. The case must be finally decided upon the decisions of this Court, and with the strong decisions from this court we feel that it will present no serious difficulty to it in resolving the answer to the question propounded, in the affirmative.

V.

Counsel complain that we have emphasized the general subject of repealment by implication and the analogy of prominent cases not involved in the statutes. It is the contention of the Government that because these statutes refer to Indians they cannot be general, and that no general law can apply to them. If such be true, then every statute which has been considered by the cases cited by us is likewise special, and there could not possibly be a general act enacted by Congress. The National Prohibition Act must be read in connection with the Eighteenth Amendment, and we might well complain that counsel for the Government has entirely ignored the Eighteenth Amendment and seeks to withdraw the Indian from any operation of that Amendment. We are well aware of the guardianship of the Government over Indians and of its power to legislate with reference to them. We do not believe, however, that it was ever the intention of the Constitution or of Congress to play hide and seek with this subject matter even before the adoption of the Eighteenth Amendment. After its adoption, however, if such had been the case, it is now swept aside by that amendment.

When the amendment was passed Congress was limited in its power to deal with intoxicating liquors, but after that amendment it was given a power more plenary over the subject matter of Intoxicating liquors than it had theretofore possessed with respect to the Indians. The amendment extended the power of Congress over every State and "all territory subject to the jurisdiction thereof." The object of the

amendment was not, therefore, to segregate the Indians from that jurisdiction, but its clear intent was to give to all other citizens and persons as much protection as the Indian had theretofore enjoyed, and to extend and enlarge that protection. Unquestionably, the intention of the amendment was to afford to the other citizens and persons in the States and Territories and the Indian Countries, at least an equal protection with the Indian, and there certainly ought not to exist a purpose of clothing those who are not Indians with less protection than the Indian had. If the history of the prohibition crusade be followed, it will be found that its advocates felt that the persons who needed protection did so as much as did the Indians. Reading the Eighteenth Amendment, therefore, we cannot but conclude that the plea now made for the Indian had been made for all others, and that all citizens and persons within the jurisdiction of Congress were placed in the same position as to protection and policy as was the Indian.

It is readily apparent, therefore, that the National Prohibition Act occupies a position somewhat different from the usual Act of Congress. When it was passed it covered Indian and all with the same protection, and provided an instrumentality by which the Indian himself would have greater protection in that it was designed to remove all possible opportunity for him to come in contact with intoxicating liquors. Prior to that time Congress was largely limited to Indian Territory in order to afford him protection, but after the amendment Congress was then empowered to govern not only immediate and near territory, but the entire country and places

over which it had jurisdiction. The amendment also had in it a mandate to Congress to put in force, and the National Prohibition Act stands practically, with reference to all prior laws, as if it had been incorporated in the Constitution itself. As we have heretofore shown, the rule is that where an act is passed to carry into effect a general provision of the Constitution, all acts inconsistent therewith, though special or local, are repealed. This is one of the fundamental exceptions which rebuts any presumption that a general act is not to be presumed to repeal a special or local one. Read in connection with the constitutional amendment, therefore, this general act covering the entire subject matter of the passage of intoxicating liquors made in pursuance of the mandate of the Constitution itself, and the first act passed to vitalize it must, in a way, be treated as if passed contemporaneously with and as a part of the Constitution, and it must either repeal or modify to the extent any conflict exists between it and any other act, either general or special. The amendment blotted out any distinctions that might have existed theretofore, and we certainly will not be denied the application of one of the most important principles applied in the construction of statutes.

This brings us back to the case of United States v. Yugonivich, supra, which, together with the other cases following it, clearly state the principles which must govern in this case. While the National Prohibition Act does not have any express purpose of specially protecting the Indians or any other purpose, but is based upon the broad intention of protecting all alike, yet under this decision of this Court, after

it had manifested such an intention, it certainly would not have preserved the severe penalties in the Indian statutes as against the milder ones in the Prohibition Act. In that case this Court recognized that Congress had manifested an intention to tax liquors illegally as well as those legally produced, but refused to preserve the old penalties. We again call the attention of the Court to its language, where it said:

> We agree with the court below that while Congress manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power, **it did not intend to preserve the old penalties prescribed in Section 3257 in addition to the specific provisions for punishment made in the Volstead Act.**

This Court again, in that case, states the rule to be applied, where it said:

> It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when **clearly inconsistent with the earlier enactments.**

There is no escape from the conclusion that the prior acts are repealed, or at least modified as to the penalties prescribed, and that the indictment in this case cannot stand and the conviction must fall.

Respectfully submitted,

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KENNEDY ET AL. *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 222. Argued April 16, 1924.—Decided May 26, 1924.

That portion of the Act of July 23, 1892, as amended, which made possession of intoxicating liquor in the Indian Country an offense and fixed its punishment, was not repealed, superseded or modified by the National Prohibition Act. P. 345.

QUESTION certified by the Circuit Court of Appeals under Jud. Code, § 239.

Mr. James Patrick Gilmore, with whom *Mr. Phil D. Brewer, Mr. F. F. Nelson, Mr. J. H. Everest, Mr. Ed. S. Vaught* and *Mr. Robert K. Everest* were on the briefs, for Kennedy et al.

Mrs. Mabel Walker Willebrandt, Assistant Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Byron M. Coon,* Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The Act of July 23, 1892, c. 234, 27 Stat. 260, and its amendments,[1] the Act of January 30, 1897, c. 109, 29 Stat. 506, and the Act of May 25, 1918, c. 86, 40 Stat. 563, make the possession of intoxicating liquor in the Indian Country, as therein defined, a criminal offense. The

[1] See *United States* v. *Wright,* 229 U. S. 226; *Joplin Mercantile Co.* v. *United States,* 236 U. S. 531.

plaintiffs in error were indicted and convicted of having whiskey in their possession in the Indian Country, in Osage County, Oklahoma, on July 24, 1920, in violation of the acts above mentioned. The case was taken on writ of error to the Circuit Court of Appeals of the Eighth Circuit and that court, under § 239 of the Judicial Code, certified a question of law to this Court. It is this:

"Was that portion of the Act of July 23, 1892, Section 4136a, Comp. Stat., as amended by the Act of January 30, 1897, Section 4137, Comp. Stat., and by the Act of May 25, 1918, Section 4137a, Comp. Stat., which made possession of intoxicating liquor in the Indian Country a criminal offense and fixed the punishment therefor repealed, superseded or modified by the enactment of the National Prohibition Act, 41 Statutes at Large, 305, 308, Title II, Sections 3, 25, 29, 33 and 35?"

The Act of 1918 provides that "possession by a person of intoxicating liquors in the Indian country where the introduction is or was prohibited by treaty or Federal statute shall be an offense and punished in accordance with" the above mentioned Acts of 1892 and 1897. Mere possession is made criminal. The purpose of the possession or the intended use is not material. The particular place and its character, Indian Country, are essential. The evils aimed at are those which result from liquor traffic in localities where Indians live or which they are liable to frequent. These statutes apply locally for the special purpose of keeping whiskey and other intoxicants out of the reach of Indians.

By the Eighteenth Amendment, the manufacture, sale or transportation of intoxicating liquors, in the United States and all territory subject to the jurisdiction thereof, for beverage purposes is prohibited. The National Prohibition Act was passed to enforce that Amendment. Liquor for non-beverage purposes may be purchased, sold and possessed as specified in that act, but not in violation

of the legislation relating to the Indian Country. See Title II, §§ 3, 4, 6, 13, 25, 33, 37.

The offense charged against plaintiffs in error is not the same as any defined in the National Prohibition Act. Those portions of the Acts of 1892, 1897 and 1918, passed for the protection of the Indian Country, mentioned in the certificate of the Circuit Court of Appeals, do not conflict with the National Prohibition Act. Both may stand. The repealing clause contained in § 35 is: "All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency . . . ." As no incompatibility exists, there is no repeal by implication. *Washington* v. *Miller,* 235 U. S. 422, 428; *United States* v. *Greathouse,* 166 U. S. 601, 605; *United States* v. *Healey,* 160 U. S. 136, 147; *Frost* v. *Wenie,* 157 U. S. 46, 58; *McClintic* v. *United States,* 283 Fed. 781.

The answer to the question certified is:

No.